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IN THE

SUPREME COURT OF THE UNITED STATES

Case No. **81-5046**

MACK C. RUFFIN, Jr.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I.

Florida's death penalty statute contains a list of aggravating and mitigating circumstances to be considered by the jury in making a recommendation and judge in ultimately deciding if death is the appropriate penalty. The prosecution in this case urged the jury and judge to find as an aggravating circumstance that Petitioner committed the capital crime while engaged in a robbery and kidnapping, even though Petitioner was not charged with these crimes and the jury was not instructed on the elements of those offenses. The trial judge

found this aggravating circumstance in his order supporting Petitioner's death sentence. The question raised is:

Whether a death sentence, which is based in part upon the aggravating circumstance that the capital crime occurred while the defendant was engaged in a kidnapping and robbery, can pass due process and cruel and unusual punishment prohibition standards, when the kidnapping and robbery offenses were not charged and the jury which considered the aggravating circumstances and recommended the death sentence received no instructions on the elements of robbery and kidnapping?

II.

One mitigating factor provided for in Florida's death penalty law is that the defendant has no significant history of prior criminal activity. The decision below held that this mitigating circumstance was negated by the Petitioner's conviction for a crime which occurred during the same criminal episode as, but subsequent to, the capital crime. The question raised is:

Whether a crime occurring during the same criminal episode as a capital crime, and only a few hours after that capital offense, can negate the mitigating circumstance of no prior history of criminal activity provided for by Florida's death penalty statute without offending the principles of due process and subjecting the capital defendant to cruel and unusual punishment?

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OPINIONS BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed via this petition is officially reported at 397 So.2d 277, and is reproduced in the appendix as item 1 (A1-16).

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued the opinion and judgment in this case on March 26, 1981. (A1-16) Petitioner filed a motion for rehearing which was denied on May 15, 1981. (A17) Petitioner asserted below and asserts here a deprivation of his rights as guaranteed under the United States Constitution. Title 28 United States Code, Section 1257(3) and Rule 17 of the United States Supreme Court Rules confers certiorari jurisdiction in this Court to review the judgment in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VIII to the Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV, Section 1 to the Constitution of the United States, in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 921.141, Florida Statutes (1977) which is set forth in the Appendix as item 8 (A98-100).

STATEMENT OF THE CASE

Petitioner and his co-defendant, Freddie Lee Hall, planned to steal an automobile to use in a robbery of a convenience store. (A1)(TR1229)[1/] On February 21, 1978, they stole an automobile and abducted the car's owner, Karol Hurst, from the parking lot of a grocery store in Leesburg, Florida. (A1)(TR1170-1248) The two men drove the car and Karol Hurst to a wooded area where Hurst was sexually assaulted and killed. (A1)(TR765-777,868-879,1170-1248) According to a statement Petitioner gave law enforcement, Freddie Lee Hall beat and shot Karol Hurst, killing her. (A1)(TR1170-1248)

Later during the same day, Petitioner and Hall drove Hurst's car to a convenience store in an adjoining county. (A1-2)(TR1229-1230) They entered the store and made a purchase. (A1-2)(TR548,558,607) However, the manager became suspicious and telephoned the Sheriff's Department substation which was across the street from the store. (A1-2)(TR545-546, 551) Deputy Lonnie Coburn confronted Petitioner and Hall in the parking lot, a scuffle ensued, and Coburn was shot and killed. (A2)(TR621,622,630-631,1230) Petitioner and Hall fled, but they were apprehended that night. (A2)(TR690-695)

Petitioner and Hall were ultimately indicted and convicted for both the Hurst and Coburn murders. Petitioner's conviction and life sentence for Coburn's murder was entered on

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1/ The symbol "TR"denotes references to the trial transcripts in this case, "R" denotes references to the trial court record and "A" denotes references to the Appendix attached to this petition.

June 1, 1978. (A96-97) Later, in a separate trial, Petitioner was found guilty, convicted and sentenced to death for Karol Hurst's murder. (A23-30)(R346-353) The judgment and death sentence in that case was entered on July 21, 1978. (R346-353)(A23-30) The Hurst case is the subject of this petition for writ of certiorari now before this Court.

Initially in the Hurst case, Petitioner was indicted for first degree murder, sexual battery, kidnapping, grand larceny and robbery. (A18-20) The State of Florida dismissed the kidnapping, grand larceny and the robbery, proceeding to trial only on first degree murder and sexual battery. (A2-3) (TR9) However, during the penalty phase of the bifurcated trial provided for by Florida law, the prosecutor urged the jury, and later the court, to consider the robbery and kidnapping as aggravating circumstances. (A66) The jury was never instructed on the elements of the crimes of kidnapping or robbery. (A14,86-92)(TR1321-1346,1407-1413) The jury recommended a death sentence, and the trial court imposed death. (A23-30,92-93)(R346-353) In his findings of fact to support the death sentence, the trial judge found that the murder occurred in the course of a robbery and kidnapping (an aggravating circumstance under §921.141(5)(d), Fla.Stat.). (A23-27) (R346-352)

At the penalty phase of the trial, the evidence established that Petitioner had no criminal record before the day of his involvement with the Coburn and Hurst murders. (A31-95) Section 921.141(6)(a), Florida Statutes (1977) provides for a mitigating circumstance if a capital defendant has no significant history of prior criminal activity. (A98-100) The prosecution argued that Petitioner's conviction for the murder of Coburn, which occurred prior to the trial of the Hurst case negated that mitigating circumstance, even though the Coburn murder occurred a few hours after the Hurst murder.

(A70-71) The trial judge did not find this mitigating circumstance in his findings of fact to support the sentence. (A23-27)(R346-352)

On appeal to the Supreme Court of Florida, Petitioner argued that his death sentence was unconstitutionally imposed in violation of the due process and cruel and unusual punishment provisions of the United States Constitutions. Specifically, Petitioner urged: (1) that the use of robbery and kidnapping as an aggravating circumstance violated due process, because those charges were never presented to the jury during the guilt or penalty phases of the trial; and (2) that the sentencing court should have found as a mitigating circumstance that Petitioner had no significant history of prior criminal activity. The Supreme Court of Florida held: (1) that use of the robbery and kidnapping as aggravating circumstances did not violate due process even though those offenses were not charged or instructed upon, because the trial judge, not the jury, made the findings of facts; and (2) that Petitioner's conviction for the Coburn murder which was entered prior to the sentencing phase of the Hurst case trial was sufficient to negate the mitigating circumstance of no significant history of prior criminal activity. (A1-12) Three of the seven justices on the Supreme Court of Florida dissented on the above holdings. (A13-16)

REASONS FOR GRANTING THE WRIT

I.

PETITIONER'S DEATH SENTENCE, WHICH WAS BASED IN PART UPON THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL CRIME OCCURRED WHILE THE PETITIONER WAS ENGAGED IN A KIDNAPPING AND ROBBERY, VIOLATED HIS RIGHT TO DUE PROCESS AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT, SINCE THE KIDNAPPING AND ROBBERY OFFENSES WERE NOT CHARGED AND THE JURY WHICH CONSIDERED THE AGGRAVATING CIRCUMSTANCES AND RECOMMENDED THE DEATH SENTENCE RECEIVED NO INSTRUCTIONS ON THE ELEMENTS OF ROBBERY OR KIDNAPPING.

Florida's capital sentencing statute requires a jury to consider and weigh evidence in support of aggravating and mitigating circumstances and recommend whether a capital defendant should receive a life sentence or death. §921.141(2), Fla.Stat. (1977); Proffitt v. Florida, 428 U.S. 242 (1976); State v. Dixon, 283 So.2d 1 (1973). Only those statutory aggravating circumstances proven beyond a reasonable doubt are to be considered. State v. Dixon, at 9. Only if the statutory aggravating circumstances proven beyond a reasonable doubt outweigh the mitigating circumstances, is a death sentence appropriate. Proffitt v. Florida, 428 U.S. 242 (1976); State v. Dixon, 283 So.2d 1 (1973). And, a jury's recommendation of life can be overridden by the sentencing judge only if the facts suggesting a death sentence are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908,910 (1975). Consequently, the function of the jury in Florida's capital sentencing structure is critical. Petitioner was denied due process in this critical stage of his case.

Petitioner was originally indicted for first degree murder, robbery, kidnapping, sexual battery and grand larceny. (A18-20) The prosecutor dismissed before trial all the charges except the murder and sexual battery. The dismissed charges were never presented to the jury and no instructions on the elements of those offense were given to the jury at any stage of the proceedings. (A2-3) Nevertheless, the prosecutor urged the jury to find the aggravating circumstance that the Petitioner committed the capital crime while engaged in a robbery and kidnapping. (A66) Later, the sentencing judge entered such a finding on his Findings of Fact to support the death sentence. (A23-27)(R346-352)

The consequences of not instructing the jury on the elements of robbery and kidnapping which were the offenses urged to aggravate the murder to a capital crime is analogous to

convicting a defendant for a crime upon which the jury was never instructed. See Cole v. Arkansas, 333 U.S. 196 (1948) Without guidance as to the legal elements of robbery and kidnapping, the jury might have erroneously found the offenses were proven, and in turn, this factor could have been determinative of the jury's recommendation. Petitioner was entitled to have a jury recommend a sentence based upon the applicable law. This did not occur.

This Court addressed a similar problem in Presnell v. Georgia, 439 U.S. 14 (1978). In Presnell, the petitioner's jury was instructed that it could impose the death sentence: (1) for rape if committed during a murder; (2) for kidnapping with bodily injury if committed during a rape; and (3) for murder if committed during a kidnapping with bodily injury, aggravated sodomy. The jury found as instructed and sentenced petitioner to death on all three offenses. The Georgia Supreme Court reversed the first two death sentences holding that the jury had not properly convicted petitioner of forcible rape. Since the instructions covered both forcible and statutory rape and the jury failed to specify which one on the verdict, the Georgia court interpreted the conviction as one for statutory rape. As to the death sentence for the murder, the Georgia court affirmed but held that the sodomy could not supply the bodily injury associated with the aggravating kidnapping. However, that court reasoned that there was sufficient evidence of a forcible rape to supply it, even though there was no jury finding as to forcible rape. Id.

This Court reversed the sentence. Relying on the rationale in Cole v. Arkansas, 333 U.S. 196 (1948), the opinion stated,

> In Cole v. Arkansas, 333 U.S. 196, 92 L.Ed. 644, 68 S.Ct. 514 (1948), petitioners were convicted at trial of one offense but their convictions were affirmed by the Supreme Court of Arkansas on the basis of evidence in the record

indicating that they had committed another offense on which the jury had not been instructed. In reversing the convictions, Mr. Justice Black wrote for the unanimous Court:

> "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made....To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." Id., at 201, 92 L.Ed. 644, 68 S.Ct. 514.

> These fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial. Cf. Gardner v. Florida, 430 U.S. 349, 51 L.Ed.2d 393, 97 S.Ct. 1197. In light of these principles, the death sentence for the crime of murder with malice aforethought cannot stand.

Presnell v. Georgia, 439 U.S. 14 (1978).

No less of a due process violation has occurred in Petitioner's case. The trial court relied upon a kidnapping and a robbery which were not charged, and for which the jury was not instructed, to aggravate the murder. Such procedures materially affects the reliability of the sentencing process, rendering Petitioner's sentence unconstitutional under the Eighth and Fourteenth Amendments of the United States Constitution.

II.

PETITIONER'S COMMISSION OF A CRIME DURING THE SAME CRIMINAL EPISODE AS THE CAPITAL CRIME, AND ONLY A FEW HOURS AFTER THAT CAPITAL OFFENSE, CANNOT NEGATE THE MITIGATING CIRCUMSTANCE OF NO PRIOR HISTORY OF CRIMINAL ACTIVITY, WITHOUT OFFENDING THE PRINCIPLES OF DUE PROCESS AND SUBJECTING THE CAPITAL DEFENDANT TO CRUEL AND UNUSUAL PUNISHMENT?

This Court upheld the facial validity of Florida's death penalty statute which included subsection (6)(a) of Section 921.141, Florida Statutes providing for a mitigating

circumstance of no significant history of prior criminal activity. Proffitt v. Florida, 428 U.S. 242 (1976). In Proffitt, this Court found no fault with the clarity of the mitigating circumstance. Id., at 257-258. However, Florida has now adopted an interpretation and application of that mitigating circumstance which promises to interject caprice and arbitrariness into capital sentencing which this Court condemned in Furman v. Georgia, 408 U.S. 238 (1972).

Petitioner had no history of criminal activity before the one day in 1978 when he became involved in two murders. The Florida Supreme Court held that the second of those two murders, which resulted in Petitioner's first conviction, could act to negate the mitigating circumstance of no significant history of prior criminal activity for the sentencing on the first murder. (A10) Ruffin v. State, 397 So.2d 277,283 (1981). According to the Florida Supreme Court, Petitioner obtained a significant history of prior criminal activity on the same day as the capital crime and during the same criminal episode. The dissenting opinion cogently discussed the unfairness of such an application,

> First, the majority holds that "in determining the existence or absence of the mitigating circumstances of no significant prior criminal activity, 'prior' means prior to the sentencing of the defendant and does not mean prior to the commission of the murder for which he is being sentenced."[1] I am troubled by the use of a contemporaneous crime in the same criminal episode to negate the mitigating circumstance of no history of prior criminal activity. The unfairness of such a holding is painfully obvious in the present case where the conviction for the murder of the deputy, which actually occurred shortly after the kidnapping, robbery and death of the woman, is utilized to create a "history" of prior criminal activity when the defendant had no other criminal history. Such a holding goes against any common-sense interpretation the phrase "history of prior criminal activity" and amounts to tortured logic in my estimation. The trial judges of our state have not interpreted this section in such a manner.[2]
>
> I can understand the majority's point with respect to a criminal history intervening

> between a stale homicide and prosecution for that homicide. However, that is not the case before us.
>
> I recognize that Elledge v. State, 346 So. 2d 998 (Fla.1977), and Provence v. State, 337 So.2d 783 (Fla.1976), cert.denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977), permit subsequent or contemporaneous criminal acts for which there is a conviction prior to the sentence for a homicide to be used in aggravation. This does not mean, however, that we should allow a contemporaneous crime to be used to negate the mitigating circumstance of no history of prior criminal activity as was done in this case. The statutory language for the aggravating circumstance speaks only in terms of "previous convictions."[3] The language related to the mitigating circumstance speaks in terms of no significant "history of prior criminal activity."[4] The term "history" must relate to a time frame broader than crimes committed contemporaneously with the crime for which the death sentence is being imposed. To hold otherwise would result in a finding of a "history" of prior criminal activity for every person who commits another crime during the same criminal episode in which a murder is committed.

Id., at 284. The dissenting opinion also noted in footnote 2 that the majority's opinion departed from the manner in which trial courts had been applying the mitigating circumstance.

> 2. Trial courts have traditionally interpreted "history of prior criminal activity" as crimes committed previously to the one for which the defendant is being sentenced. See, e.g. Hargrave v. State, 366 So.2d 1 (Fla.1978), cert.denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979); Songer v. State, 365 So.2d 696 (Fla 1978), cert. denied, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979); Salvatore v. State, 366 So.2d 745 (Fla.1978);

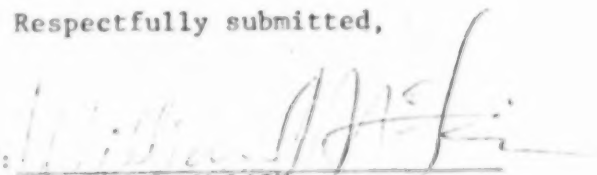
Id.

The application of the mitigating circumstance of no significant history of prior criminal activity in Petitioner's case violates due process and subjects Petitioner to cruel and unusual punishment. This Court recently reversed a death sentence for unconstitutional application of an aggravating circumstance. Godfrey v. Georgia, 446 U.S. 420 (1980) Petitioner's death sentence is just as constitutionally infirm from a misapplication of a mitigating circumstance.

CONCLUSION

Upon the foregoing reasons, Petitioner asks this Court to grant a writ of certiorari.

Respectfully submitted,

BY: 

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APPENDIX

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Supreme Court of Florida

Nos. 55,684 & 56,741

MACK C. RUFFIN, JR., Appellant,

vs.

STATE OF FLORIDA, Appellee.

[March 26, 1981]

PER CURIAM.

Mack C. Ruffin, Jr. appeals his convictions of murder in the first degree and sexual battery of Karol Hurst and his sentence of death. We have jurisdiction pursuant to article V, section 3(b)(1), Florida Constitution. Having reviewed the record and considered the issues raised by Ruffin, we find no reversible error.

Intending to steal an automobile to use in a convenience store robbery, on February 21, 1978, Ruffin and his companion, Freddie Lee Hall, drove to a Pantry Pride grocery store parking lot. There they stole an automobile and at gun point abducted its owner, Karol Hurst, who was twenty-one years old and seven months pregnant. They drove their victim to a heavily wooded area where they sexually abused her. Although she pleaded for her life and offered Ruffin and Hall a check for $20,000, she was pistol whipped on her head, neck, shoulder, and body, was robbed of her pocketbook, wallet, and checkbook, and was shot to death with a .38 caliber pistol in the back of her head while lying face down on the ground.

After the murder of Mrs. Hurst, Ruffin and Hall drove the stolen car to the convenience store which they intended to rob. Pretending to be customers, they purchased a teddy bear and two bundles of socks. Suspicious of these two men,

the store manager asked a customer to call the sheriff's department. Without attempting the planned robbery, Ruffin and Hall left the store. Outside Deputy Coburn, holding his shotgun, was standing by his patrol car. A customer in the store observed Mrs. Hurst's car parked near the store. The store manager telephoned the sheriff's substation across the street as soon as the two left the store. She then heard what she thought to be a gunshot. Immediately thereafter, Deputy Coburn was found shot lying on the ground. Beside him was the .38 caliber pistol that had killed Mrs. Hurst, the teddy bear, and the socks. The deputy who arrived at the scene and found Coburn's body saw Mrs. Hurst's car speeding away from the scene. Another deputy was dispatched to pursue this automobile. A high speed chase ensued, and the passenger in the car being pursued fired three shots at the deputy. This automobile was then abandoned, and the two were pursued on foot and were finally apprehended. In the automobile were found a .357 magnum pistol belonging to Deputy Coburn, Mrs. Hurst's handbag, groceries which she had purchased just prior to her abduction, and Ruffin's fingerprint.

Mrs. Hurst's body was found with a bullet hole through the back of her head, a deep abrasion below the right chin, two deep abrasions and a large bruise in the shoulder area, an abrasion and contusion over the right shoulder, four abrasions and two large contusions on the back of the neck, and a contusion to the right nipple which the pathologist testified would have been quite painful. The cause of death was the bullet that entered the back of the victim's head and traversed her brain. The pathologist stated, however, that the death would not necessarily have been instantaneous.

Ruffin confessed that he and Hall had stolen the car to use in a convenience store robbery, had abducted Mrs. Hurst, had raped her, and that Hall had shot her to death.

Ruffin was indicted for first-degree murder, sexual battery, kidnapping, grand larceny, and robbery. The latter

three charges were nolle prossed, and he was tried and convicted of murder in the first degree and sexual battery of Mrs. Hurst. Prior to his sentencing, he had also been convicted and sentenced to life imprisonment for the killing of Deputy Coburn. This conviction was affirmed by the District Court of Appeal, Fifth District, Ruffin v. State, No. 78-1118 (Fla. 5th DCA Sept. 3, 1980).

He argues first that his conviction should be reversed because the trial court erred in refusing to grant a mistrial after certain allegedly prejudicial remarks were made by the prosecutor in closing argument and because the court did not poll the jury as to whether they had seen a particular headline of a newspaper located in a newsstand near where the jurors were lunching. These contentions are completely without merit and warrant no further discussion.

Ruffin also challenges his conviction on the basis that the trial court erred in admitting into evidence testimony of other offenses committed by him contrary to the "Williams rule." Williams v. State, 110 So.2d 654 (Fla. 1959), cert. denied, 361 U.S. 847 (1959). He concedes that this challenged evidence tended to prove identity in that it linked him to the victim's automobile, explained where the murder weapon was located, and how he was apprehended, however, relying upon Smith v. State, 344 So.2d 915 (Fla. 1st DCA 1977), cert. denied, 353 So.2d 679 (1977), he argues that this evidence should not have been admitted because it was not necessary to the prosecution of this case and that the prosecutor was overzealous in utilizing it. He contends that under the "Williams rule" such evidence, to be admissible, must be not only relevant but also necessary to the prosecution.

The State counters that this evidence which was clearly relevant to proving the identity of Ruffin was properly admitted into evidence. It contends that the test for the admissibility of such evidence is relevancy, not necessity. We agree with the State's contention, and, to the extent that the language of the district court's opinion in Smith v. State is inconsistent with our holding, it is disapproved.

In Williams v. State, we announced a broad rule of admissibility based upon relevancy. Necessity has never been established by this Court as an essential requisite to admissibility. In Williams, we declared that any fact relevant to prove a fact in issue is admissible into evidence even though it points to a separate crime unless its admissibility is precluded by a specific rule of exclusion. We further held that evidence of collateral offenses is inadmissible if its sole relevancy is to establish bad character or propensity of the accused. We emphasized that the question of relevancy of this type of evidence should be cautiously scrutinized before it is determined to be admissible, but that nonetheless relevancy is the test. Evidence of other crimes is relevant if it casts light on the character of the crime for which the accused is being prosecuted. For example, this evidence is relevant when it shows either motive, intent, absence of mistake, common scheme or plan, identity, or a system or general pattern of criminality. Subsequently, in Williams v. State, 117 So.2d 473 (Fla. 1960), we reaffirmed the rule of admissibility enunciated in our first Williams case but reversed a defendant's conviction because the State had made a collateral offense a feature instead of an incident of the trial. We held that the State had gone too far in the introduction of testimony about a later crime committed by the accused so that the inquiry transcended the bounds of relevancy to the charge being tried, and we stated:

> This may not be done for the very good reason that in a criminal prosecution such procedure devolves from development of facts pertinent to the main issue of guilt or innocence into an assault on the character of the defendant whose character is insulated from attack unless he introduces the subject.

117 So.2d at 475-76. Thereafter, in Wilson v. State, 330 So.2d 457 (Fla. 1976), we held that the introduction of six hundred

pages of trial transcript pointing to separate crimes committed by the defendant was not reversible error because this evidence was relevant to establish a pattern of conduct similar to the conduct for which defendant was being prosecuted.

In Ashley v. State, 265 So.2d 685 (Fla. 1972), defendant sought reversal of a murder conviction because the trial court admitted evidence of four other murders that he had committed shortly after the murder for which he was tried. We held that the evidence objected to was admissible because it was relevant to the issues of motive, intent, identity, and modus operandi of defendant. We reached this conclusion even though this evidence may not have been necessary to the State's case since Ashley's confession was in evidence as was the testimony of an eyewitness to the murder. We emphasized: "So long as evidence of other crimes is relevant for any purpose the fact that it is prejudicial does not make it inadmissible. All evidence that points to a defendant's commission of a crime is prejudicial. The true test is relevancy." 265 So.2d at 694. See also Antone v. State, 382 So.2d 1205 (Fla. 1980); Brown v. State, 381 So.2d 690 (Fla. 1980); Alford v. State, 307 So.2d 433 (Fla. 1975).

In our recent decision of Smith v. State, 365 So.2d 704 (Fla. 1978), relying upon Ashley v. State, we recited that among the other purposes for which a collateral crime may be admitted under Williams is establishment of the entire context out of which the criminal action occurred. We said:

> At trial the state's theory was that, as Johnson testified, the two murders occurred during one prolonged criminal episode. The three perpetrators met together and planned a robbery. The rest of the night was devoted to the robbery, its concealment, and the allocation of the proceeds. From the time the parties met and conspired to commit robbery, there was an unbroken chain of circumstances relating to and flowing from

> the robbery. Because of the robbery two related murders occurred within a short time of one another. Of the three men who committed the first murder, one was the victim of the second murder and the other two were his killers. Smith's car was used throughout the criminal episode and the same ice pick was used in the robbery and both murders. The second murder is clearly a part of the context surrounding the murder for which Smith was tried. Evidence of the murder of Wagner is therefore relevant to illustrate the criminal context in which the first murder occurred.
>
> Additionally, the testimony concerning the second homicide is relevant to place Smith at the scene of the first, since it shows that he was with the people involved in the initial homicide just an hour after it took place. He was also placed by this evidence in a car which was directly linked to the scene of the first murder.

365 So.2d at 707.

The testimony of collateral crimes to which Ruffin objects was properly admitted into evidence because it was relevant to the material issue of identity and because it established the entire context out of which the criminal action occurred. Furthermore, we find that contrary to Ruffin's assertion, this testimony did not become a feature as opposed to an incident of his trial on the present charges.

In addition to reviewing the record in light of the alleged errors asserted by Ruffin which are without merit, we have reviewed the evidence pursuant to Florida Rule of Appellate Procedure 9.140(f), and we conclude that no new trial is required. We, accordingly, affirm the convictions for murder in the first degree and sexual battery.

We next consider Ruffin's challenges to his death sentence. After a jury recommendation of death, the trial court imposed the sentence of death. It found that the following aggravating circumstances had been proven beyond a reasonable doubt:

> (a) That at the time of the crime for which he is to be sentenced, the Defendant had been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person.

(b) That the crime for which the Defendant is to be sentenced was committed while the Defendant was engaged in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, any robbery, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb.

(c) That the crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel . . . .

The court gave the following reasons in justification for finding these three aggravating circumstances:

A. That at the time the crime for which Defendant Ruffin is to be sentenced he had previously been convicted of one felony involving the threat of violence to persons, as is shown and reflected by the copy of the 1978 adjudication of guilt of Defendant Ruffin of First Degree Murder, copy of the adjudication having been introduced into evidence by the State during the sentencing proceeding.

B. That the crime for which Defendant Ruffin is to be sentenced was committed while in the act of committing a robbery, and kidnapping, namely the robbery and kidnapping of Karol Lea Hurst on the 21st day of February, 1978, at approximately 3:00 P.M. as is shown and reflected by the testimony presented during the trial and sentencing proceeding.

C. The crime for which the Defendant Ruffin is to be sentenced is especially heinous and atrocious. A summary of the testimony in regard to Paragraph B and C above is as follows:

AS TO ROBBERY

1. That Karol Lea Hurst while returning to her parked automobile after buying groceries at the Pantry Pride Grocery Store, located at the J.M. Fields Plaza in Leesburg, Florida, was robbed by the Defendant Ruffin of certain items; her pocketbook, wallet, checkbook, and a 1975 Plymouth Fury belonging to her and her husband, Benjamin Hurst.

AS TO KIDNAPPING

2. At the same time and place Karol Lea Hurst was forcibly and against her will kidnapped and abducted by the Defendant Ruffin from said J.M. Fields Plaza Parking Lot and driven by Hall the co-defendant, in said Plymouth Fury to a heavily wooded area in Sumter County, Florida, where she was pistol whipped on and about her head, neck, shoulders and body and was sexually abused by either or both Defendants, Mack Ruffin, Jr. and his co-defendant Freddie Lee Hall.

AS TO HEINOUS AND ATROCIOUS ACTS

The victim Hurst was, at that time, 21 years of age, 7 months pregnant, and married less than one year. She begged and pleaded with either or both Defendant Ruffin and his co-defendant Hall to spare her life and that of her unborn child. Evidence in the form of her check in the sum of $20,000.00 was found at the crime scene to support her unheeded plea. She was shot in the back of the head while lying face down with a .38 caliber pistol. The said .38 caliber pistol was found four hours later under the dead body of Deputy Lonnie C. Coburn, shot to death in Hernando County, Florida.

Ruffin argues that the trial court erred in finding as an aggravating circumstance that the murder occurred during the course of a kidnapping and robbery, first, because he was not on notice that these offenses would be considered and, second, because he was not tried for these particular offenses by the jury. Ruffin's first contention is without merit. A defendant has no right to a statement of particulars as to the aggravating circumstances upon which the State will rely to support its request for the death penalty. Clark v. State, 379 So.2d 97 (Fla. 1979). His second contention is also without merit. It was not necessary that Ruffin be charged and convicted of the robbery and the kidnapping that led to the murder of Mrs. Hurst. The State proved beyond a reasonable doubt that concomitant with the murder Ruffin also committed the robbery and the kidnapping. The State has clearly met its burden, and the court properly found and applied this aggravating circumstance.

We likewise reject Ruffin's assertion that the trial court erroneously considered his conviction for murder of Deputy Coburn as the aggravating circumstance, "previously convicted of another capital offense," since this conviction was on appeal to the District Court of Appeal, Second District, at the time of sentencing. We recently held that this aggravating circumstance encompasses convictions in existence at

the time of sentence for crimes committed after the murder for which a defendant is being sentenced. King v. State, 390 So.2d 315 (Fla. 1980). Ruffin submits, however, that if the prior conviction of a felony involving the use or threat of violence is to be used as an aggravating circumstance, it must be final and that in the present case it was not final at the time of sentencing in view of his pending appeal of that conviction. Citing Joyner v. State, 158 Fla. 806, 30 So.2d 304 (1947), he suggests that we analogize this situation to the enhancement of sentences under the habitual offender act. Section 775.084, Florida Statutes (1977). We reject this analogy. Ruffin, at the time of sentencing, had been adjudged guilty of Coburn's murder, and the fact that this conviction was on appeal did not affect its consideration for the purpose of determining Ruffin's character and propensity to commit violent crimes. In Joyner v. State, we held that before a prior conviction may be used to enhance punishment under the habitual offender statute, the prior conviction must be final and, if an appeal is taken from a judgment of guilty, the conviction is not final until the judgment of the lower court is affirmed on appeal. But we explained that the purpose of the habitual offender statute "is to protect society from habitual criminals who persist in the commission of crime after having been theretofore convicted and punished for crimes previously committed." 30 So.2d at 306.

On the other hand, the purpose of considering previous violent convictions in capital cases differs from the purpose of the habitual offender statute. In Elledge v. State, 345 So.2d 998, 1001 (Fla. 1977), we said "the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge."

Certainly, the fact that a defendant has been found guilty by a jury and adjudicated guilty by the trial court of such violent crimes is material to this character analysis. A defendant previously convicted of a violent felony against the person of another should not be able to escape this character analysis by an argument that his conviction, which is presumed to be correct, is on appeal. Ruffin's previous conviction for the murder of Deputy Coburn was properly considered by the trial court because it was relevant to a determination of Ruffin's propensity to commit violent crimes. Peek v. State, No. 54,226 (Fla. Oct. 30, 1980).

Ruffin further contends that the trial court reversibly erred in failing to consider and to weigh the mitigating circumstance of no significant history of prior criminal activity. The State, during closing argument in the sentencing phase of the trial, urged the jury and judge to consider Ruffin's murder of Deputy Coburn as significant prior criminal activity. Ruffin now contends that it was improper to consider this criminal conduct because it occurred during the same criminal episode and after the murder for which he was being tried. The State responds that this criminal activity was properly considered to negate the mitigating circumstance of no significant history of prior criminal activity.

We hold that in determining the existence or absence of the mitigating circumstance of no significant prior criminal activity, "prior" means prior to the sentencing of the defendant and does not mean prior to the commission of the murder for which he is being sentenced. The interpretation of "prior" advanced by Ruffin is unreasonable particularly in view of the fact that a defendant may have committed a murder for which he is not apprehended until many years later and during the course of these years he may have a long history of significant criminal activity. Ruffin's position would prevent the court from negating this mitigating circumstance by considering the defendant's criminal activity occurring after the commission of the murder. This interpretation would thwart the legislature's intent when it established this mitigating circumstance.

We also find no merit in Ruffin's assertion that the court erred in not considering and weighing as a mitigating factor that his participation in the murder was minor and that he was under the domination of Hall. Apparently, neither the jury which recommended the death penalty nor the trial court believed that Ruffin's participation was minor or that he was under Hall's domination. His contention is premised solely on a self-serving portion of his confession, and the record does not evidence this alleged domination or only minor participation in the criminal activities culminating in the death of Mrs. Hurst.

Furthermore, the trial court did not err in not finding Ruffin's dull normal intelligence to be a mitigating factor. Although recognizing that his intelligence level does not fit into the statutory mitigating circumstances relating to mental conditions, Ruffin urges that the court should have considered it to be a non-statutory mitigating circumstance. The mere fact that evidence that Ruffin was of dull normal intelligence was presented does not mean, as Ruffin seems to suggest, that the trial court was compelled to find this to be a mitigating factor.

We also reject Ruffin's contentions that his sentence of death amounts to cruel and unusual punishment and that the trial court erroneously limited the jury to consideration of statutorily enumerated mitigating circumstances contrary to the requisites of Lockett v. Ohio, 438 U.S. 586 (1978). Review of the record of the instructions in the sentencing phase of the trial reveals that the court limited the jury only to its consideration of statutorily enumerated aggravating circumstances but did not limit the jury to consideration of only statutorily delineated mitigating circumstances.

Accordingly, finding no reversible error, we affirm the judgments and sentences.

It is so ordered.

ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., Concur
SUNDBERG, C.J., Concurs as to conviction, and dissents as to sentence with an opinion, with which ENGLAND and McDONALD, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

SUNDBERG, C. J., dissenting.

Although I concur with the affirmance of the conviction, I have grave problems with the death sentence affirmed by the majority.

First, the majority holds that "in determining the existence or absence of the mitigating circumstance of no significant prior criminal activity, 'prior' means prior to the sentencing of the defendant and does not mean prior to the commission of the murder for which he is being sentenced."[1] I am troubled by the use of a contemporaneous crime in the same criminal episode to negate the mitigating circumstance of no history of prior criminal activity. The unfairness of such a holding is painfully obvious in the present case where the conviction for the murder of the deputy, which actually occurred shortly after the kidnapping, robbery and death of the woman, is utilized to create a "history" of prior criminal activity when the defendant had no other criminal history. Such a holding goes against any common-sense interpretation of the phrase "history of prior criminal activity" and amounts to tortured logic in my estimation. The trial judges of our state have not interpreted this section in such a manner.[2]

I can understand the majority's point with respect to a criminal history intervening between a stale homicide and prosecution for that homicide. However, that is not the case before us.

I recognize that Elledge v. State, 346 So.2d 998 (Fla. 1977), and Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977), permit subsequent or contemporaneous criminal acts for which there is a conviction prior to the sentence for a homicide to be used in aggravation. This does not

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[1] Majority opinion at page 10.

[2] Trial courts have traditionally interpreted "history of prior criminal activity" as crimes committed previously to the one for which the defendant is being sentenced. See, e.g. Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919 (1979); Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979); Salvatore v. State, 336 So.2d 745 (Fla. 1978).

mean, however, that we should allow a contemporaneous crime to be used to negate the mitigating circumstance of no history of prior criminal activity as was done in this case. The statutory language for the aggravating circumstance speaks only in terms of "previous convictions."[3] The language related to the mitigating circumstance speaks in terms of no significant "history of prior criminal activity."[4] The term "history" must relate to a time frame broader than crimes committed contemporaneously with the crime for which the death sentence is being imposed. To hold otherwise would result in a finding of a "history" of prior criminal activity for every person who commits another crime during the same criminal episode in which a murder is committed.

A second problem which concerns me is the fact that the jury was permitted to consider robbery and kidnapping in aggravation, even though the defendant was neither charged with[5] nor convicted of those crimes. Although the trial judge is experienced enough to know the elements which make up the crime of robbery and kidnapping, I do not believe we can attribute that same expertise to a jury. The prosecution urged this aggravating circumstance[6] on the jury as well as the court and it occurs to me that the jury may very well have found that the homicide occurred during the commission of a robbery and a kidnapping without ever having been instructed as to the elements of those crimes.

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[3]Section 921.141(5)(b), Florida Statutes (1979), states: "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person."

[4]Section 921.141(6)(a), Florida Statutes (1979), states: "The defendant has no significant history of prior criminal activity."

[5]Although originally indicted for these crimes they were nolle prossed before trial.

[6] Section 921.141(5)(d), Florida Statutes (1979), states: "The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb."

Since I conclude there was error in permitting the jury to consider an aggravating factor upon which they had not been properly instructed coupled with the existence of one found mitigating circumstance--age--as well as another that was supported by the evidence (no significant history of prior criminal activity) resentencing is called for. Elledge v. State. Furthermore, since the taint in the process may have affected the jury's recommendation I would remand for a full sentencing hearing before jury and judge.

ENGLAND and McDONALD, JJ., Concur

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MAR 30 19[illegible]

Appellate Division
Public Defenders Office

Consolidated Appeals from the Circuit Court in and for Sumter County,

John W. Booth, Judge - Case Nos. 78-260 CF A; 78-52 CF A; 78-258 CF A; 78-50 CF and 78-433 CF

Jack O. Johnson, Public Defender and Douglas A. Lockwood, Assistant Public Defender, Bartow, Florida; and W. C. McLain, Special Assistant Public Defender, Fort Myers, Florida,

for Appellant

Jim Smith, Attorney General, and William I. Munsey, Jr. and Charles Corces, Jr., Assistant Attorneys General, Tampa, Florida,

for Appellee

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MAR 30 [illegible]

Appellate Division
Public Defenders Office

Supreme Court of Florida

FRIDAY, MAY 15, 1981

MACK C. RUFFIN, JR.,	*	
	*	
Appellant,	*	CASE NOS. 55,684 and 56,741
	*	
v.	*	Circuit Court Nos. 78-260CFA; 78-52CFA; 78-258CFA; 78-50CF and 78-433CF
	*	(Sumter)
STATE OF FLORIDA,	*	
	*	
Appellee.	*	
	*	
* * * * * * * * * * * * * * * * *		

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MAY 20 1981

Appellate Division
Public Defenders Office

Upon consideration of the Motion for Rehearing filed in the above styled causes,

IT IS ORDERED that said Motion be and the same is hereby denied.

ADKINS, BOYD, OVERTON and ALDERMAN, JJ., concur
SUNDBERG, C.J., ENGLAND and McDONALD, JJ., dissent

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court
by: Sonya Carroll
Deputy Clerk

TC
cc: Hon. C. Burton Marsh, Clerk
Hon. John W. Booth, Judge

W. C. McLain, Esquire
William I. Munsey, Jr., Esquire
Charles Corces, Jr., Esquire

IN THE CIRCUIT COURT of the Fifth Judicial Circuit of the State of Florida, in and for SUMTER County, at the SPRING Term thereof, in the Year of Our Lord, One Thousand Nine Hundred and Seventy-Eight.

THE STATE OF FLORIDA

-v-

MACK RUFFIN, JR. and
FREDDIE LEE HALL,

_____/

Case No. 78-50-CF
Ct. I- INDICTMENT FOR: KIDNAPPING (F-1)
Ct.II- SEXUAL BATTERY (F-1)
Ct.III- GRAND LARCENY (F-3)
Ct.IV- ROBBERY (F-1) (Life)

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

THE GRAND JURORS OF THE STATE OF FLORIDA, empaneled and sworn to inquire and true presentment make, in and for the body of the County of SUMTER, upon their oaths do present, that MACK RUFFIN, JR., and FREDDIE LEE HALL, of the County of SUMTER, and State of Florida, on the 21st day of February, in the Year of Our Lord One Thousand Nine Hundred and Seventy-Eight, in the County and State aforesaid:

COUNT I: without lawful authority did then and there forcibly, secretly, or by threat, confine, abduct or imprison another person, to-wit: KAROL LEA HURST, against her will, with the intent to kidnap, rape, rob and murder the said KAROL LEA HURST, in violation of Florida Statutes 787.01.

COUNT II: And THE GRAND JURORS OF THE STATE OF FLORIDA, empaneled and sworn to inquire and true presentment make, in and for the body of the County of SUMTER, upon their oaths do present, that MACK RUFFIN, JR., and FREDDIE LEE HALL, of the County of SUMTER, and State of Florida, on the 21st day of February, 1978, in the County and State aforesaid: did unlawfully commit sexual battery upon KAROL LEA HURST, without said KAROL LEA HURST's consent by forcibly having sexual intercourse, when the Offenders coerced the Victim to submit by threatening to use force of violence likely to cause serious personal injury on the Victim, in violation of Florida Statute 794.011(4).

COUNT III: And THE GRAND JURORS OF THE STATE OF FLORIDA, empaneled and sworn to inquire and true presentment make, in and for the body of the County of SUMTER, upon their oaths do present, that MACK RUFFIN, JR., and FREDDIE LEE HALL, of the County of SUMTER, and State of Florida, on the 21st day of February, 1978, in the County and State aforesaid: did unlawfully and feloniously steal from the possession and lawful custody of KAROL LEA HURST, a motor vehicle, to-wit: 1975 Plymouth, 2 door, VIN RL21G5G121515, with the intent to permanently deprive or defraud the true owner of her property or the use and benefit thereof, or to appropriate the same to the use of the taker or person other than the true owner, in violation of Section 812.021(1)(a), Florida Statutes.

COUNT IV: And THE GRAND JURORS OF THE STATE OF FLORIDA, empaneled and sworn to inquire and true presentment make, in and for the body of the County of SUMTER, upon their oaths do present, that MACK RUFFIN, JR., and FREDDIE LEE HALL, of the County of SUMTER, and State of Florida, on the 21st day of February, 1978, in the County and State aforesaid: did unlawfully by force, violence, assault or putting in fear, take certain property, to-wit: personal belongings, the property of KAROL LEA HURST, as owner or custodian, from the person or custody of KAROL LEA HURST, and in the course of committing said Robbery, carried a firearm to-wit: .38 caliber Smith-Wesson Special Handgun, in violation of Florida Statute 812.13.

contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Florida.

A TRUE BILL.

Stanton M. Gideons, Jr.
Foreman of the Grand Jury

I HEREBY CERTIFY that as authorized and required by law, I have advised the Grand Jury returning this Indictment.

STATE ATTORNEY

PRESENTED AND FILED in Open Court this 7th day of March, 1978.

C. BURTON MARSH, CLERK OF CIRCUIT COURT

By Sara H. Mason D.C.

IN THE CIRCUIT COURT of the Fifth Judicial Circuit of the State of Florida, in and for SUMTER County, at the SPRING Term thereof, in the Year of Our Lord One Thousand Nine Hundred and Seventy-Eight.

THE STATE OF FLORIDA)
vs.)
MACK RUFFIN, JR., and)
FREDDIE LEE HALL)

Case No. 78-52-CF
INDICTMENT FOR: 1st DEGREE MURDER (P-1) Capital

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

THE GRAND JURORS OF THE STATE OF FLORIDA, empaneled and sworn to inquire and true presentment make, in and for the body of the County of SUMTER, upon their oaths do present, that MACK RUFFIN, JR., and FREDDIE LEE HALL on the County of SUMTER, and State of Florida, on the 21st day of February, in the Year of Our Lord One Thousand Nine Hundred and Seventy-Eight, in the County and State aforesaid:

did unlawfully from a premeditated design to effect the death of KAROL LEA HURST, a human being, or any human being, did kill and murder the said KAROL LEA HURST by shooting her with a pistol, a further and more particular description being to this body unknown, in violation of Florida Statute 782.04.

contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Florida.

A TRUE BILL

Stanton M. Gibbons, Jr.
Foreman of the Grand Jury

I HEREBY CERTIFY that as authorized and required by Law, I have advised the Grand Jury returning this Indictment.

State Attorney

PRESENTED AND FILED in Open Court this 7th day of March, 19 78.

C. Burton Marsh
Clerk of Circuit Court

By: Sara H. Mason D.C.

IN THE CIRCUIT COURT

PUTNAM COUNTY, FLORIDA

SPRING TERM 19 78

CASE NO. 78-433-CF

STATE OF FLORIDA

VS.

C. MACK RUFFIN, JR.,

Defendant

JUDGMENT AND SENTENCE

You, C. MACK RUFFIN, JR., being personally before this Court, represented by William H. Stone and Michael Kovac, your attorneys of record having been tried and found guilty of the crime of ~~entered a plea of guilty to the crime of~~ entered a plea of Nolo Contendere to the crime of C. MACK RUFFIN, JR., the Court, at this time, gives you an opportunity to be heard and show cause why you should not be adjudged guilty and sentenced as provided by law, including an opportunity to offer matters in mitigation of sentence. No cause being shown, it is, thereupon:

ORDERED, that you, C. MACK RUFFIN, JR., are hereby adjudged guilty of the crime of SEXUAL BATTERY. It is the sentence of the law that you be committed to the custody of the Department of Offender Rehabilitation of the State of Florida, to be imprisoned for the term of Thirty years (30) in the institution in the State Correctional System to which said Department may cause you to be confined. It is further,

ORDERED, that you shall be allowed credit for such time as you have been incarcerated prior to the imposition of this sentence for this offense. It is further,

ORDERED, that this sentence is, (concurrent), (~~consecutive~~), with the sentence imposed June 1, 1978, for the crime of Murder In The First Degree, in Case Number 78-248-CF B, Lake County, Florida. It is further,

ORDERED, that the Sheriff of Putnam County, Florida, is hereby ordered and directed to deliver you to the Department of Offender Rehabilitation, together with a copy of this Judgment and Sentence. It is further

~~ORDERED AND ADJUDGED, that you shall pay the sum of One Dollar ($1.00), pursuant to Section 943.25(3), Florida Statutes, and the sum of $ for costs of prosecution, pursuant to Section 939.01, Florida Statutes.~~ (Strike if not applicable).

The Court does now advise you that it is your right to appeal from this Judgment and Sentence within thirty (30) days from this date, and you are further advised that you are entitled to the assistance of counsel in the filing and preparation of your appeal. Upon your request, and upon your showing that you are entitled to an attorney at the expense of the State, the Court will appoint one for you.

DOR-c-c

FILED IN OPEN COURT

This 21 D. July 19 78

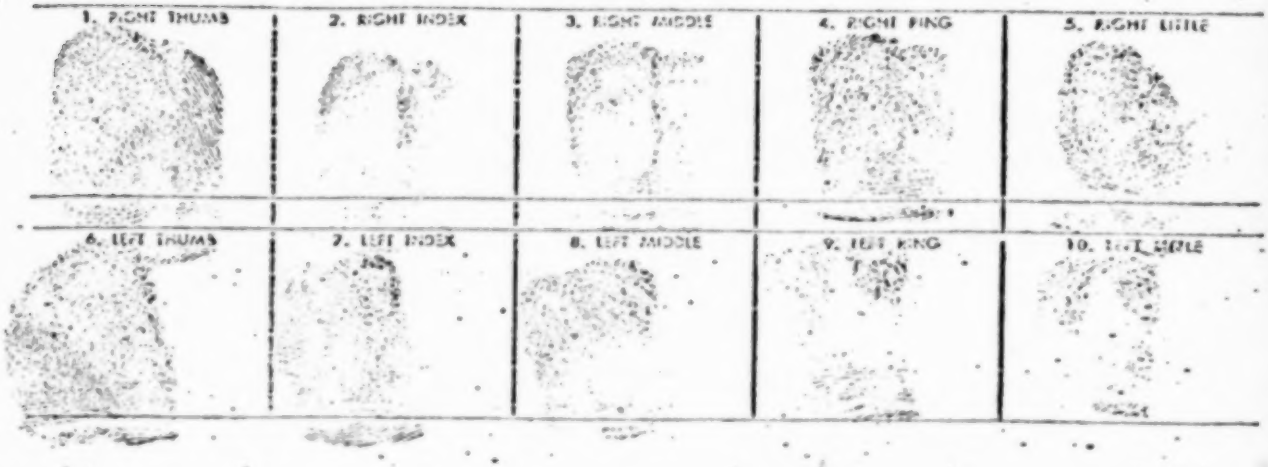
CHARLES H. CL. NT COURT

Case 78-433-CF

21

The following are the fingerprints of the above-named Defendant, C. MACK RUFFIN, JR.,

(FINGERPRINTS)



DONE AND ORDERED IN Open Court at Putnam County, Florida, this 21st day of July, A. D. 19 72.

I HEREBY CERTIFY that the above and foregoing fingerprints on this Judgment and Sentence are the fingerprints of the Defendant, C. MACK RUFFIN, JR., and that they were placed thereon by said Defendant in my presence in Open Court this date.

John W. Booth
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF FLORIDA
SEVENTH JUDICIAL CIRCUIT, IN AND
FOR PUTNAM COUNTY

CASE NO: 78-433 CF.

THE STATE OF FLORIDA

vs

MACK RUFFIN, JR.

Defendant.

FILED IN OPEN COURT
This 21 day of July 1978
CHARLES H. HODD
CLERK CIRCUIT COURT
Case 78-433 CF
Dep. Clk.

FINDINGS OF FACT

THIS CAUSE coming on this day to be considered pursuant to the provisions of Section 921.141, Florida Statutes, after (a) the conviction of the Defendant, Mack Ruffin, Jr., of Murder in the First Degree, by a duly impaneled jury, and (b) the rendition by such jury at the conclusion of the sentencing proceeding of an Advisory Sentence recommending the imposition of the death sentence, and after carefully considering and weighing the evidence presented during such trial and sentencing proceeding, the arguments of the attorneys as to the sentence to be imposed, the undersigned concludes and determines:

1. That the State proved beyond a reasonable doubt the following aggravating circumstances, to wit:

(a) That at the time of the crime for which he is to be sentenced, the Defendant had been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person.

(b) That the crime for which the Defendant is to be sentenced was committed while the Defendant was engaged in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, any robbery, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb.

(c) That the crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel:

Heinous means extremly wicked or shockingly evil.
Atrocious means outrageously wicked and vile.
Cruel means designed to inflict a high degree of pain.

and the State failed to prove beyond a reasonable doubt the following aggravating circumstances, to wit:

(a) That the crime for which the Defendant is to be sentenced was committed while the Defendant was under sentence of imprisonment:

(b) That the Defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons.

(c) That the crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape.

(d) That the crime for which the Defendant is to be sentenced was committed for pecuniary gain.

(e) That the crime for which the Defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

2. That the Defendant Ruffin proved the following mitigating circumstances, to wit: age of the defendant at the time of the crime.

3. That the Defendant Ruffin failed to establish by evidence any other mitigating circumstances and upon consideration only of the records of such trial and sentencing proceedings and the evidence properly introduced therein makes the following:

FINDINGS OF FACT

A. That at the time the crime for which Defendant Ruffin is to be sentenced he had previously been convicted of one felony involving the threat of violence to persons, as is shown and reflected by the copy of the 1978 adjudication of guilt of Defendant Ruffin of First Degree Murder, copy of the adjudication having been introduced into evidence by the State during the sentencing proceeding.

B. That the crime for which Defendant Ruffin is to be sentenced was committed while in the act of committing a robbery,

and kidnapping, namely the robbery and kidnapping of Karol Lea Hurst on the 21st day of February, 1978, at approximately 3:00 P.M. as is shown and reflected by the testimony presented during the trial and sentencing proceeding.

C. The crime for which the Defendant Ruffin is to be sentenced is especially heinous and atrocious. A summary of the testimony in regard to Paragraph B and C above is as follows:

AS TO ROBBERY

1. That Karol Lea Hurst while returning to her parked automobile after buying groceries at the Pantry Pride Grocery Store, located at the J.M. Fields Plaza in Leesburg, Florida, was robbed by the Defendant Ruffin of certain items; her pocketbook, wallet, checkbook, and a 1975 Plymouth Fury belonging to her and her husband, Benjamin Hurst.

AS TO KIDNAPPING

2. At the same time and place Karol Lea Hurst was forcibly and against her will kidnapped and abducted by the Defendant Ruffin from said J.M. Fields Plaza Parking Lot and driven by Hall the co-defendant, in said Plymouth Fury to a heavily wooded area in Sumter County, Florida, where she was pistol whipped on and about her head, neck, shoulders and body and was sexually abused by either or both Defendants, Mack Ruffin, Jr. and his co-defendant Freddie Lee Hall.

AS TO HEINOUS AND ATROCIOUS ACTS

The victim Hurst was, at that time, 21 years of age, 7 months pregnant, and married less than one year. She begged and pleaded with either or both Defendant Ruffin and his co-defendant Hall to spare her life and that of her unborn child. Evidence in the form of her check in the sum of $20,000.00 was found at the crime scene to support her unheeded plea. She was shot in the back of the head

while lying face down with a .38 caliber pistol. The said .38 caliber pistol was found four hours later under the dead body of Deputy Lonnie C. Coburn, shot to death in Hernando County, Florida.

The summary of the above testimony is based on :

1. Benjamin Hurst's testimony that the said 1975 Plymouth Fury belonged to Karol Lea Hurst and himself and that he did not know the Defendant Ruffin or give him permission to use his car.

2. Charlotte Best's testimony that the said 1975 Plymouth Fury was in the custody of the Defendant Ruffin at approximately 7:00 P.M. on February 21st, 1978, immediately prior to the murder of Deputy Lonnie C. Coburn.

3. Barbara Brunson's testimony as to the identity of the pocketbook, wallet and checkbook as belonging to the said Karol Lea Hurst. Those items were found by Arthur Cody in the said 1975 cream colored Plymouth Fury, owned by Karol Lea Hurst and her husband, Benjamin Hurst, a short time after the murder of Deputy Lonnie C. Coburn and before finding the body of Karol Lea Hurst.

4. Desland Culpepper, next door neighbor of Karol Lea Hurst testified as to the purchase by the said Karol Lea Hurst of certain items of groceries from the Pantry Pride Store in Leesburg, Florida, prior to the finding of the body of Karol Lea Hurst.

5. Arthur Cody, Deputy Sheriff, testified that some of the groceries mentioned in (4) above were discovered in the Hurst car shortly after Defendant Ruffin abandoned such car.

6. Dr. William Shutze, Medical Examiner for the Fifth Judicial Circuit, testified that Karol Lea Hurst, the victim, had been badly beaten and bruised on and about the head, neck, shoulders and body and her right breast was bruised causing severe pain, and further that male sperm was found in her vagina, this being consistent with rape. He also testified that she died as a result of a bullet fired from a .38 caliber revolver which the Defendant Ruffin in his confession stated was left at the scene of the

murdered Hernando County Deputy, Lonnie C. Coburn.

7. The Defendant Ruffin's confession given to Detective Mylander and Detective Ftizgerald on the morning of the 22nd of February, 1978 and admitted into evidence in which the Defendant Ruffin stated that the victim, Karol Lea Hurst, was beaten and shot to death by his co-defendant Hall. He also admitted that he and his co-defendant had sexual relations by gunpoint with the victim and that she was too afraid to resist. The Defendant Ruffin further stated he stood and watched while his co-defendant Hall "chopped" Karol Lea Hurst behind the neck in an effort to break it and Defendant Ruffin witnessed his co-defendant Hall pistol whip and shoot the victim Karol Lea Hurst in the back of the head with a .38 caliber revolver while she begged for her life and the life of her unborn child. In a futile attempt to save her life and that of her unborn child, she offered the sum of $20,000.00 in the form of a check which was admitted into evidence. The said .38 caliber revolver was later found under the Deputy Lonnie C. Coburn, shot to death in Hernando County, Florida.

8. Charles Myers, Ballistic Expert, Region 4 Crime Laboratory, Sanford, Florida, Testified that the bullet in the victim Hurst was fired from the .38 caliber revolver found under the dead Hernando County Deputy Sheriff.

Based exclusively and only upon (1) the records and the evidence properly introduced and admitted during the trial and sentencing proceeding, and (2) the sufficent aggravating circumstances set forth in Paragraph A, B and C above and finding the one mitigating circumstance is insufficient to outweight the aggravting circumstances, the undersigned accepts and agrees with the Advisory Sentence recommending that the death sentence should be imposed on said Defendant, Mack Ruffin, Jr.

Dated this 21st day of July, 1978.

John W. Booth

JOHN W. BOOTH, CIRCUIT JUDGE

IN THE CIRCUIT COURT

PUTNAM COUNTY, FLORIDA

SPRING TERM 19 78

CASE NO. 78-433-CF

STATE OF FLORIDA

VS.

C. MACK RUFFIN, JR.,

Defendant

JUDGMENT AND SENTENCE

You, C. MACK RUFFIN, JR., being personally before this Court, represented by William Stone and Michael Kovac, your attorney of record, having been tried and found guilty of the crime of ~~been tried and found guilty of the crime of~~ ~~entered a plea of guilty to the crime of~~ ~~entered a plea of Nolo Contendere to the crime o~~ MURDER IN THE FIRST DEGREE

~~The Court, at this time, gives you an opportunity to be heard and show cause why you should not be adjudged guilty and sentenced as provided by law, including an opportunity to offer matters in mitigation of sentence.~~ No cause being shown, it is, thereupon:

ORDERED, that you, C. MACK RUFFIN, JR., are hereby adjudged guilty of the crime of MURDER IN THE FIRST DEGREE. ~~It is the sentence of the law that you be committed to the custody of the Department of Offender Rehabilitation of the State of Florida, to be imprisoned for the term o~~ in the institution in the State Correctional System to which said Department may cause you to be confined. It is further,

~~ORDERED, that you shall be allowed credit for such time as you have been incarcerated prior to the imposition of this sentence for this offense.~~ It is, further,

ORDERED, that the Sheriff of Putnam County, Florida, is hereby ordered and directed to deliver you to the Department of Offender Rehabilitation, together with a copy of this Judgment and Sentence.

~~The Court does now advise you that it is your right to appeal from this Judgment and Sentence within thirty (30) days from this date, and you are further advised that you are entitled to the assistance of counsel in the filing and preparation of your appeal. Upon your request, and upon your showing that you are entitled to an attorney at the expense of the State, the Court will appoint one for you.~~

2-DOR-nc

FILED IN OPEN COURT

THIS 21 DAY OF July 19 78

CHARLES H. HODGES
CLERK CIRCUIT COURT

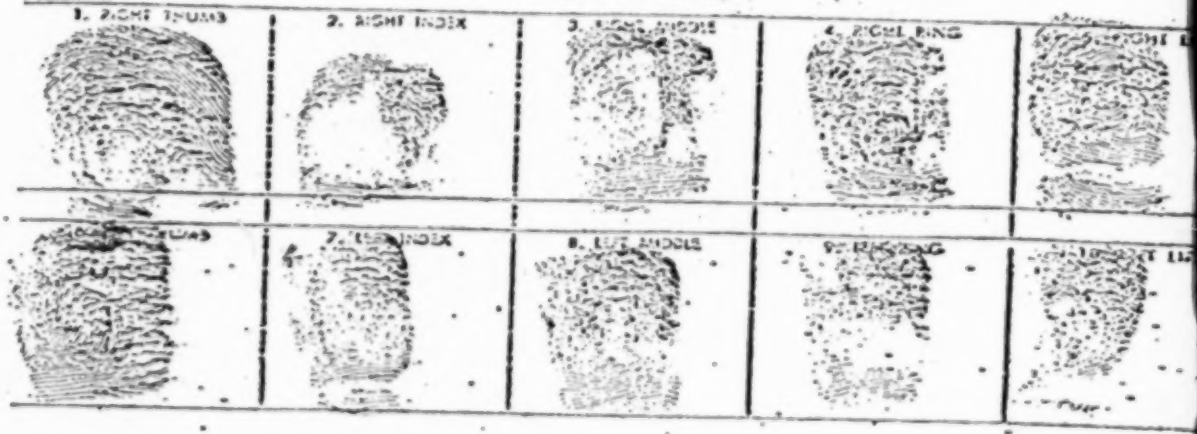
CASE: 78-433-CF

DEP. CLK.

Best Copy Available

The following are the fingerprints of the above-named Defendant, C. MACK RUFFIN, JR.,

(FINGERPRINTS)



DONE AND ORDERED IN Open Court at PUTNAM Cou
Florida, this 21st day of July, A. D. 19 78
I HEREBY CERTIFY that the above and foregoing fingerprints on this Judgment and Sentence are the fingerprints of the Defendant, C. MACK RUFFIN, JR., and they were placed thereon by said Defendant in my presence in Open Court this date.

John W. Scott
CIRCUIT JUDGE

Best Copy Available

IN THE CIRCUIT COURT OF FLORIDA,
SEVENTH JUDICIAL CIRCUIT, IN AND
FOR PUTNAM COUNTY

CASE NOS. 78-260 CF A (Lake)
78-52 CF A (Sumter)
78-258 CF A (Lake)
78-50 CF (Sumter)
78-433 CF (Putnam)

THE STATE OF FLORIDA,

vs.

C. MACK RUFFIN, JR.,

Defendant.

JUDGMENT AND SENTENCE

THE above named Defendant, with his counsel, William H. Stone and Michael Kovac, heretofore entered his plea of Not Guilty to the charge of Murder in the First Degree as defined by Section 782.04, as amended, of the Florida Statutes; and thereupon said Defendant was duly tried by a jury with his attorney's representing him at such trial, and the jury having brought in its verdict finding the Defendant Guilty of Murder in the First Degree; and rendered its Advisory Verdict; and the Court having adjudicated said Defendant guilty of said offense and filed its Findings of Fact herein;

And the Defendant being asked by the Court whether he had anything to say why sentence of the law should not now be pronounced upon him, and saying nothing to preclude such sentence; it is therefore,

THE JUDGMENT, ORDER AND SENTENCE of this Court that he be electrocuted til dead in the manner directed by the laws of the State of Florida.

DONE AND ORDERED in Open Court, Palatka, Putnam County, Florida, this 21st day of July 1978.

FILED IN OPEN COURT
this 21 day of July 19 78
CHARLES M. HOOD
CLERK CIRCUIT COURT
CASE 78-433 CF CRS

John W. Booth
JOHN W. BOOTH, CIRCUIT JUDGE

offense of sexual battery. Take the jury out, please. 135

JURY EXCUSED FROM OPEN COURT.

THE COURT: Take the defendant out.

DEFENDANT ESCORTED FROM COURTROOM.

NOON RECESS.

SECOND PHASE: ADVISORY SENTENCE.

WHEREUPON, COURT RECONVENED, THE DEFENDANT IS PRESENT, THE JURY RETURNED TO OPEN COURT, AND THE FOLLOWING PROCEEDINGS WERE HAD:

THE COURT: Ladies and gentlemen of the jury, you have found the defendant guilty of first degree murder. The punishment for this crime is either death or life imprisonment. The final decision as to what punishment shall be imposed rests solely with the Judge of this Court; however, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

At this time the the State and the defendant may present evidence relative to what sentence you should recommend to the Court. You are instructed that this evidence is presented in order that you might determine, first, whether or not sufficient aggravating circumstances exist which would justify the imposition of the death penalty, and secondly, whether there are mitigating circumstances sufficient to outweigh the

the aggravating circumstances, if any. At the conclusion of the taking of the evidence and after arguments of the attorneys, you will be instructed on the factors in aggravation and mitigation that you may consider. 135

Under the rules of procedure, the State presents the aggravating circumstances, if any, which they would like you to hear, and then the defendant has the right to present any mitigating circumstances, if any, that you should hear.

The State may proceed.

MR. BROWN: The State calls to the stand Tom Mylander.

MR. KOVAC: May we approach the Bench?

THE COURT: Yes.

CONFERENCE AT THE BENCH OUT OF HEARING OF JURY:

(MR. KOVAC: Your Honor, I realize and recognize there has been no testimony commenced at this moment; I was advised at the hearing conference with Mr. Brown that Detective Mylander is being called for the specific purpose of relating that my client was aware that the decedent was seven months pregnant at the time of this incident. Your Honor, we will at this time register an objection to any such testimony being elicited, and we specifically cite the case of Elledge versus State of Florida, 346 Southern 2 998, Supreme Court of Florida, dated April 7, '77, and which specifically holds that there will be no evidence presented at such a hearing that relates to matters on which there has not been a conviction. Your

Honor will recall that my client is, I believe, under indictment on a manslaughter charge that is still pending as to the alleged unborn child. Any testimony involving pregnancy or an unborn child would be inadmissible here, since there is such a charge pending. The Elledge case specifically goes to the fact that we only deal with convictions and do not deal with charges that are pending. This constitutes testimony in regard to the charge which is pending.)

(MR. BROWN: If the Court please, in State versus Elledge, I disagree with Mr. Kovac that that is the holding. I would ask the Court to consider Florida Statute 921.141(1), which provides that any information of probative value that will be of benefit to the jury in determining the existence of the five factors of aggravating circumstances should be permitted to go to the jury. I believe the Court has previously considered this matter, and I believe that the testimony with regard to the knowledge of the defendant that Karol Lea Hurst was seven months pregnant at the time he raped and killed her, as determined by verdict of this jury, has a definite probative value as to subsection (h) in the recommendations, that being the determination of whether the crime was particularly heinous, atrocious or cruel. This has great probative value and I ask the Court to allow it.)

(THE COURT: [Cited case reviewed.] Objection overruled. I believe it comes under the especially heinous and

atrocious section.)

(MR. KOVAC: Again, in the prehearing conference we had occasion to discuss the witnesses; there is Barbara Bronson, who, I believe, will confirm the existence of the pregnancy, Your Honor, even though we realize .... we object to Barbara Bronson taking the stand specifically because of the extreme sympathetic situation that must occur as soon as she is identified as the mother, as she will testify she is, as she has testified in other proceedings in the other trials. We realize this becomes a tear-jerker when she gets on the stand.)

(MR. BROWN: She has indicated to me that she is in control of herself. She realizes the strain she's going to be under, and she said she will not break down.)

(THE COURT: I don't think it should be elicited that she's her mother.)

(MR. STONE: In further argument on the point raised by Mr. Kovac, we would submit that any testimony by the mother as pertains to this particular proceeding does not fall within any of the specified categories listed under the aggravating circumstances that can be elicited by the State. The State is specifically limited by the statute to those specific categories and cannot go outside of those limitations, and this has no relevancy. And we further argue that the defendant is presently facing prosecution for the offense of manslaughter involving the death of the unborn child, and they intend to present tes-

-timony in phase two of this crime. We would submit that is an improper comment in regard to these proceedings, and would prejudice any subsequent proceedings involving the other offense of manslaughter.)

(MR. BROWN: I disagree as to the recitation made by Mr. Stone. I believe pursuant to Florida Statute 921.141, the information that Karol Lea Hurst was in fact seven months pregnant at the time she was killed by the defendant, as determined by verdict of this jury, is an aggravating circumstance which the jury may consider in determining whether he should receive a life or death sentence recommendation. With regard to any possible prosecution for manslaughter, I think that's irrelevant for purposes of this proceeding.)

(MR. STONE: He's being prosecuted, Your Honor.)

(THE COURT: As far as Mrs. Bronson's testimony, I'm not quite sure I understand; are there some other aspects you wish to present her testimony for? Or would it be cumulative? They can put Mylander on, is my ruling; but Mrs. Bronson might be cumulative.)

WHEREUPON, THE STATE CALLED TO THE WITNESS STAND THOMAS MYLANDER, SWORN BY THE COURT.

DIRECT EXAMINATION BY MR. BROWN:

Q Will you state your full name for the record, please?

A Thomas A. Mylander.

Q I believe during phase one of this trial, Detective Mylander

you testified that on February 21st and 22nd you were employed 1356
by the sheriff's department of Hernando County as a deputy
sheriff, is that correct?

A. That's correct.

Q. I believe you further testified before the jury during phase one that in the morning hours of February 22nd, 1978, you saw the defendant, Mack Ruffin, Jr., and had occasion to speak with him, is that correct?

A. That's correct.

Q. You previously played a tape before this jury of a statement given by the defendant, Mack Ruffin, is that correct?

A. Yes, sir.

Q. Did Mack Ruffin have other conversations with you other than the taped statement which was played before the jury yesterday?

A. Yes, sir, he did.

Q. During the course of those conversations with you, did he discuss Karol Lea Hurst?

A. Yes, sir, he did.

Q. And during the course of those discussions, with reference to Karol Lea Hurst, did the defendant Ruffin tell you anything about Karol Lea Hurst's physical condition?

A. Yes, sir, he did.

Q. What did he tell you?

A. Mr. Ruffin was asked when they took the lady down to the

wooded area where he and Mr. Hall both took her, after they both had sex with her, Mr. Ruffin stated, after being asked the question, "What was she saying when she was pleading for her life?", and Mr. Ruffin stated, "She was saying something about her baby." He also stated that she said she wanted to live and wanted her baby to also live.

Q Did she say anything specifically about her physical condition to them?

A Yes, sir, at this point Mr. Ruffin was asked, "How far along did she say she was?", and he said, "I believe she was seven months."

Q And that was referring to pregnancy?

A Yes, sir.

MR. BROWN: You may inquire.

CROSS EXAMINATION BY MR. STONE:

Q Officer Mylander, during the course of your investigation involving this particular event, did you have occasion to see the other man involved in this thing, Freddie Lee Hall?

A Yes, sir, I did.

Q Would you describe him for the jury, please?

A Approximately in his early thirties, thirty-one, thirty-two years old; approximately five-foot-eleven, somewhere nearing six-foot tall; husky build, very muscular.

Q Very muscular.

A Yes, sir.

Q Larger than this man over here?

A Yes, sir.

Q Considerably larger?

A Muscle-wise, yes, sir.

Q During the course of your investigation did you have an opportunity to make any investigation or determination as regards the criminal background of Hall?

A Yes, sir, we ran some checks on Mr. Hall.

Q What was the result of your investigation or check in that regard?

MR. BROWN: Your Honor, if the Court please, I would enter an objection for the record at this point, I don't believe that has probative value with reference to aggravating circumstances or mitigating circumstances for this particular defendant.

MR. STONE: Your Honor, may we approach the Bench?

THE COURT: Yes.

CONFERENCE AT THE BENCH OUT OF HEARING OF JURY:

(MR. KOVAC: Your Honor, the cases on this subject have given the defense wide latitude to be able to explore any areas that may be relevant.)

(THE COURT: I think you're right. You're talking about Hall's prior convictions, is that it?)

(MR. STONE: Yes, sir.)

(MR. BROWN: Which one?)

(MR. STONE: We have only one conviction of any significance at the time of the investigation going on.) 1359

(MR. KOVAC: He has no right to talk about the other first degree murders.)

(MR. BROWN: But you're asking him where he saw Freddie Lee Hall and have him say at the operations center, and "Did you speak to him", he said yes, "Did he tell you about Karol Hurst," he said yes; was his version of what happened different from Ruffin's?)

(MR. KOVAC: I think we have a right to do that.)

(THE COURT: I can't even indicate at this time how I ruled on that point.)

CROSS EXAMINATION CONTINUED BY MR. STONE:

Q Again, Officer Mylander, I think in essence my question I had asked you just prior to the interruption was, that as a result of your investigation did you make any determination as far as the prior criminal record of the other man, Freddie Lee Hall?

A Yes, sir, we did make a record check.

Q And what was the result of that record check or investigation of his prior criminal record?

A Mr. Hall had a record, he was convicted, the date, I can't state, I'm not sure of it, but he was convicted at one time of rape, and he was sent to prison for this.

Q Hall was?

A Yes.

Q During the course of your investigation did you likewise have an opportunity to make an investigation or check as to the prior criminal record of the defendant in this proceeding, Mack Ruffin?

A Yes, sir, we did have a record check run.

Q What was the result of your record check as pertains to Mr. Ruffin?

A There was no record found, as far as him being an adult. The juvenile records are not kept on file.

Q No record of any kind of adult convictions, or adult criminal violations?

A No, sir.

Q Is there anything distinctive about the facial features of the defendant Hall?

A Other than the fact that his eyes were always mentioned by the various people.

Q His eyes were always mentioned?

A Yes, in talking to the witnesses, this type thing, his eyes were mentioned as the predominating feature of his face.

Q In what respect?

A Very sleepy looking, a sleepy-eyed look, squinty-eyed.

MR. STONE: I don't have any further questions.

RE-DIRECT EXAMINATION BY MR. BROWN:

Q Detective Mylander, is it true that juvenile records and

convictions are sealed and would not be available for your inspection in making a record check of the defendant Ruffin? 1361

MR. KOVAC: Objection, Your Honor, it calls for a conclusion that the witness may not be able to respond to.

THE COURT: Sustained.

RE-DIRECT EXAMINATION CONTINUED BY MR. BROWN:

Q I think you indicated to Mr. Stone that you had occasion to see Freddie Lee Hall during the course of your investigation into the murder of Karol Lea Hurst; when and where did you see the defendant Hall?

A This was approximately two A.M. the morning of the 22nd of February, 1978.

Q And where did you see him at that time?

A This was at the operations center of the Pasco County sheriff's department.

Q Did you have occasion to speak to the defendant Hall at that time?

A At that time I listened to a statement made by Mr. Hall.

Q Was this a statement made in your presence?

A Yes, sir.

MR. KOVAC: Your Honor, we object to this line of questioning, and we request permission to approach the Bench?

THE COURT: Yes.

CONFERENCE AT THE BENCH OUT OF HEARING OF JURY:

(MR. KOVAC: Your Honor, for the record, the criteria

that the State may make inquiry into with regard to this phase 1362
two is strictly construed and rigidly approached in 921.141. Counsel would attempt to digress into areas where there is no possible way of cross examination, or else in areas that have no relevancy under the statute, and we would object to counsel bringing in extraneous arguments that are not rigidly controlled by the statute.)

(MR. BROWN: 921:141 provides for the Court to receive any evidence which the Court deems to have probative value, that's subsection (1) of Florida Statute 921.141, regardless of its admissibility in phase one of the trial, and I would submit that testimony with regard to the defendant Hall does have probative value with regard to mitigating circumstances, which the defense has already alluded to in his questioning of the witness, Detective Mylander. And, further, with regard to aggravating circumstances which the State intends to elicit, I would cite the Court also to the case, a Florida Supreme Court case, 1975, Albert versus State, regarding Penalty Hearing, under rule of law, that there should not be a narrow application or interpretation of the rules of evidence in a penalty hearing with regard to relevance or any other matter except illegally seized evidence. I believe under the authority of 921.141, and specifically Albert versus State, Florida Supreme Court, that I am allowed to proceed with this line of questioning initiated by Mr. Stone in his cross examination,

and I would ask the Court to allow it to continue.) 1363

(MR. STONE: I have three arguments in that regard. My line of questioning on cross had nothing to do with any statements made by the co-defendant; it simply dealt with the results of his independent investigation as regards to the criminal record of the defendant and the physical appearance of the co-defendant. Number two, the aggravating circumstances as specified in 921.141(5), in the verbage preceding those specified aggravating circumstances, it indicates that "Aggravating circumstances shall be limited to the following:". And the statement of the co-defendant, Freddie Lee Hall, has nothing to do with anything pertaining to the aggravated circumstances specified. I would also cite the case of Purdy v. State, 343 Southern 2d 4, as authority that the State necessarily has to be limited to the aggravated circumstances strictly specified in the statute. And I further submit that any testimony by Officer Mylander as to any conversation or statement made by the co-defendant Hall would constitute improper hearsay and would be inadmissible in this proceeding unless the co-defendant, Freddie Lee Hall, was here physically to testify under cross examination.)

(MR. KOVAC: And one further point, we would further argue that this hearing does not go to the guilt or innocence of the defendant; that issue has already been resolved. The only probative value that Hall's confession could have would

be to attack the State's own evidence on direct in phase one as to the defendant's statement that they put in evidence. If they had put in Hall's statement, or exerpts from Hall's statement dealing with the truth or falsity of the statement that Ruffin made, they could compare the two and they contradict. We're not here for guilt or innocence, we're only dealing with the limited restrictive aggravating circumstances and/or mitigating circumstances.) 1364

(MR. BROWN: If the Court please, with regards first to the hearsay point, the statute in question, Florida Statute 921.141, specifically provides that hearsay testimony should be proper and admissible. With regard to Mr. Stone's other point, this line of questioning and testimony to be elicited has specific relevance to one of the aggravating and mitigating circumstances, and more specifically, to the one and only negating circumstance which the defense is apparently trying to show and which in his cross examination of this witness he is attempting to elicit, that being that Mack Ruffin acted under extreme duress from Freddie Lee Hall, a much bigger man, in forcing him to go along and acting the way he acted like Mack Ruffin acted from his own confession. I submit that testimony from Detective Mylander as to Freddie Lee Hall's statement made in his presence goes directly .... it has a mixed probative value on that issue of whether Mack Ruffin was acting under force and duress or was acting of his own free will.

That's the probative value the statement deals with, it goes directly to an aggravating circumstance and a mitigating circumstance, a fact the defense has already questioned this witness about, and I believe it is entirely proper under the statute and under Albert versus State, and under the rules, for me to proceed with that line of questioning for that limited purpose.) 1365

(MR. KOVAC: They're trying to impeach their own evidence that they put on, and it's uncontroverted. If they had put in a contradictory statement and had our man gotten on the stand and testified to that, I think they might be able to do it, to put in the other statement, but since they put it in on direct evidence and did not refute it, it stands uncontorverted, and as a consequence, anything they bring in now, it looks to me like we're dealing with a mistrial situation.)

THE COURT: Take the jury out.

WHEREUPON, THE JURY EXCUSED FROM OPEN COURT AND THE FOLLOWING PROCEEDINGS WERE HAD IN THE ABSENCE OF THE JURY:

THE COURT: I assume the defense is going to assert in its mitigating circumstances the fact that he is young, and he could have been under the influence of Hall, or, under the provision of the statute, if he was under the domination of another person or was acting under extreme duress. This is the problem, the State presents its evidence under the law, and then the defendant presents his evidence, and if this were

a regular trial I think the State would be able to rebut if he, the defendant, acted under duress or substantial domination of another person. In other words, there is no coming back on rebuttal. 1366

MR. BROWN: It says the State and the defendant will present evidence of aggravating or mitigating nature; each side will be permitted to cross examine the witnesses presented by the other side, and the State will present evidence first. It does not provide for rebuttal.

THE COURT: That's the problem, according to the statute written up by the Legislature that we have to follow, the State cannot come back and rebut. If the defendant puts facts of that mitigating circumstance in, then I think it would be proper for the State to rebut. It appears that the statement Hall made, which is substantially the same except each one says, no, the other one did it; other than that, the statements are substantially the same. If it is the defense's intention to assert that as a mitigating circumstance, which I assume certainly it will, then I think the State does have the right to go ahead and put that in evidence now, there being no way for rebuttal. The statute is clear on it, the State has a chance to put its evidence on and then the defendant has the right; it doesn't say anything about rebuttal.

MR. BROWN: I think they put it in issue by their questioning of the witness with regard to the physical size,

being muscular, being much bigger, and the rest of his appearance, and his prior criminal record, I think they have already put that mitigating circumstance in issue. I think that is further support for the State's position.

THE COURT: Take the defendant out.

DEFENDANT ESCORTED FROM COURTROOM.

THE COURT: We'll take a ten minute recess.

BRIEF RECESS.

WHEREUPON, COURT RECONVENED, THE DEFENDANT IS PRESENT, THE JURY RETURNED TO OPEN COURT, AND THE FOLLOWING PROCEEDINGS WERE HAD:

MR. BROWN: Your Honor, if the Court please, due to the seriousness of this particular phase of the trial and in the interest of fairness, I will withdraw the question voluntarily which I asked the witness Mylander with reference to Hall's confession. I have no further questions.

MR. STONE: Nothing further of this witness.

WITNESS, TOM MYLANDER, EXCUSED.

WHEREUPON, THE STATE CALLED TO THE WITNESS STAND LINDA JAMES, SWORN BY THE COURT.

DIRECT EXAMINATION BY MR. BROWN:

Q State your name for the record, please?

A Linda James.

Q Linda, what is your profession or occupation?

A I'm supervisor of the criminal department for James C.

Watkins, Clerk of the Circuit Court, Lake County, Florida. 1368

Q How long have you been employed by the Clerk of the Circuit Court in Lake County in that capacity?

A Three years.

Q Were you employed in that capacity by the Clerk of the Circuit Court of Lake County between May 22nd, 1978, and June 1st, 1978?

A Yes, I was.

Q During the course of your official duties as Clerk of Court did you have occasion to preside as clerk in a criminal trial before the Honorable Judge Booth?

A Yes, sir.

Q And who was the defendant on trial in that proceeding?

A Mack Ruffin.

Q Were you present throughout the trial?

A Yes, sir, I was.

Q Was there a verdict returned by the jury in that proceeding?

MR. STONE: Your Honor, may we approach the Bench?

THE COURT: Yes.

CONFERENCE AT THE BENCH OUT OF HEARING OF THE JURY:

(MR. BROWN: What now?)

(MR. STONE: I anticipate you are going to ask this witness about the verdict that was returned in the case involving the death of the deputy in the trial held in Lake

County, Florida?) 1369

(MR. BROWN: That's correct.)

(MR. STONE: I would submit an objection to any further testimony regarding that particular conviction inasmuch as that offense itself arose subsequent to the offense for which the defendant has just been tried and conviction was entered.)

(MR. BROWN: If the Court please, Elledge versus State, Supreme Court of Florida, decided April 7, 1977, Case Number 48081, and specifically, headnote number one, in which the Supreme Court of the State of Florida has held that evidence of a previous conviction was admissible at a sentencing hearing even though the murder occurred after the killing for which this sentence was being imposed, and further, that it was proper to admit testimony concerning the events which resulted in the prior conviction. I believe Elledge versus State, and also the aggravating circumstances set forth in Rule 3.780 dealing with prior convictions at the time of sentencing, permits the State to elicit this information. I believe the Court has ruled on previous cases, specifically with regard to this defendant in the trial which was a companion to this trial, that it is indeed proper, and I would ask the Court to so hold again.)

(MR. KOVAC: May it please the Court, the preceding case involving Mr. Ruffin has been literally obliterated by virtue of the Williams rule. They used the Williams rule to

convict my client because he killed Lonnie Coburn last time he did it, and now he's killed Karol Hurst. Each time they've used a prior conviction of my client, and it has inundated the defense, based on the Williams rule, Your Honor. Now they attempt to segregate those two items and use the prior conviction where they proved the Hurst case, and pile it up on us and say it applies to the Elledge situation. I don't disagree with the Elledge case, that's the law in the State of Florida, but, Your Honor, the Elledge case doesn't take into consideration the repeated usage of the Williams rule, and in that circumstance, Your Honor, since they've already proved that, it's preposterous to say ..... they can do it over our objection, it clearly does not track our situation.) 1370

(MR. BROWN: I submit the Court was correct in its ruling in the trial against Freddie Lee Hall. I submit the Court would be correct to rule the same way in this cause, and would ask the Court to so rule.)

(THE COURT: Objection overruled.)

DIRECT EXAMINATION CONTINUED BY MR. BROWN:

Q Linda, who was the defendant in that trial between May 22nd, 1978, and June 1st, 1978?

A C. Mack Ruffin, Jr.

Q Was there a verdict returned by the jury in that case?

A Yes, sir.

Q What was that verdict?

A Murder in the first degree.

Q And was that verdict for murder in the first degree against Mack Ruffin a verdict of guilty or not guilty?

A Guilty.

Q Were you present when that verdict was returned in open court?

A Yes, I was.

Q Was the defendant adjudicated guilty by the judge in that trial?

A Yes, sir, he was.

Q Was that also in open court and in your presence?

A Yes, sir, it was.

Q I'll ask you to stand and see if you can identify the individual whom you saw convicted and adjudicated guilty of murder in the first degree on June 1st, 1978, in Tavares, Lake County, Florida.

A (Witness standing.)

Q Do you see him in the courtroom?

A Yes.

Q Where is he seated?

A He's to the right, in the beige jacket, sitting next to the gentleman in the black jacket with white pants.

MR. BROWN: If the record may reflect, the witness has correctly identified the defendant in this cause, Mack Ruffin, Jr.

DIRECT EXAMINATION CONTINUED BY MR. BROWN: 1372

Q Was there another defendant in that case as well?

A Yes, sir.

Q What was his name?

A Freddie Lee Hall.

Q Was there also a verdict returned as to Freddie Lee Hall?

A Yes, sir, there was.

Q What was that verdict?

A The same, murder in the first degree.

Q Linda, what was the case number assigned to that case, State of Florida versus Mack Ruffin, Jr.?

A The Lake County case number?

Q Any case numbers with which you're familiar.

A I'm sorry, as to Mack Ruffin, Jr.?

Q Yes.

A Hernando County case number 78-40-CF-A; Lake County case number 78-248-CF-B.

MR. BROWN: Thank you, nothing further.

CROSS EXAMINATION BY MR. STONE:

Q Mrs. James, I believe you indicated you were familiar with the guilty verdict of first degree murder as regards Mack Ruffin; were you also present when this man was sentenced?

A Yes, sir, I was.

Q Do you recall the sentence that was imposed pursuant to that adjudication of guilt?

A Mack Ruffin?

Q Yes, ma'am.

A Life imprisonment.

Q Were you likewise present when the co-defendant, Freddie Lee Hall, was sentenced?

A Yes, sir, I was.

Q Do you recall what sentence was imposed pursuant to the adjudication of guilt as regards Freddie Lee Hall?

A Yes, sir.

Q What was that sentence?

A To be electrocuted until death.

MR. STONE: Nothing further.

MR. BROWN: Nothing further.

WITNESS, LINDA JAMES, EXCUSED.

MR. BROWN: The State calls Michael Lascalsa.

MR. KOVAC: May we approach the Bench, Your Honor?

THE COURT: Yes.

CONFERENCE AT THE BENCH OUT OF HEARING OF THE JURY:

(MR. KOVAC: I understand Mr. Lascalsa has a certified copy of the judgment and sentence as to the defendant Ruffin in the preceding case; in the interest of time, if that is all he will testify to, we have no cross examination, assuming that the document is accurate, and we can stipulate it in at this point without having live testimony.)

MR. BROWN: If the Court please, in lieu of the testi-

-mony of this witness, the State and the defendant are pre- 137
pared at this time to stipulate to the marking and introduction into evidence of a certified copy of the judgment and sentence of guilt for murder in the first degree in case number 78-248-CF-B, State of Florida versus Mack Ruffin, Jr.

MR. KOVAC: So stipulated.

THE COURT: Mark it in evidence as State Exhibit No. 1 for this hearing.

MR. BROWN: In view of the admission of the judgment and sentence of guilt, the State will have no questions to ask of the witness, Mr. Lascalsa.

THE COURT: You may step down.

WITNESS, MICHAEL LASCALSA, EXCUSED.

MR. BROWN: If the Court please, with the introduction of that item of evidence, the State has no further testimony to bring forth in this proceeding, and would reserve any further comment for argument.

MR. KOVAC: May we approach the Bench, Your Honor?

THE COURT: Yes.

CONFERENCE AT THE BENCH OUT OF HEARING OF THE JURY:

(MR. KOVAC: Your Honor, in Chambers we dealt with the possibility of, in lieu of calling the psychiatrist, we discussed the possibility of the psychiatric report being offered into the record as a defense exhibit in the phase two section; would the Court prefer we read it into the record? I don't

know how else we can get it in the record and to the jurors. If they pass it around, it would take them three hours to read it.) 137

(MR. BROWN: If the Court admits it, they can take it back to the jury room with them, along with the judgment and sentence, because we didn't read the judgment and sentence, either. They can read both of them, if the Court overrules the objection I have to make to the document.)

(THE COURT: Your objection is overruled. I will permit it to be introduced into evidence. The question is whether it's to be read or just published to the jury, handed to them.)

(MR. KOVAC: I think, again, Your Honor, if we had the psychiatrist here, we would be able to derive that testimony and put it out there for the jury to hear, in his voice. We don't have that, and in the interest of time, not having that, the impact may or may not be the same as if we had the doctor here, but I think it should at least be read to them rather than take it in with them. They haven't taken anything in with them before in the preceding phase one of the trial.)

(MR. BROWN: If the Court please, I believe there's no problem in phase two in allowing them to have these two exhibits in. The reason for them not going in with them before was to preserve the chain of custody; we don't have that issue on these two items. I believe to read it into the record

would allow the substantial possibility that a tone of voice or inflection or an emphasis could be raised by the person reading it, whether intentionally or not intentionally, which would go beyond the four corners of the document itself and which might not comport with the intent or meaning which the doctor places on it. I think since it is going into evidence, it should be just given to the jury as an item for them to take back with them, and they can read it and interpret it any way they want to. I won't argue anything with regard to it that would prejudice its presentation, but to allow him to read the whole thing would allow for a substantial possibility that there would be a tone of voice or inflection given, unintentionally or intentionally.)

(MR. KOVAC: I don't think there's anything so damaging that an inflection would change it at all.)

(MR. STONE: And then they wouldn't have knowledge of what's in there until after we've made our arguments.)

(MR. BROWN: The thing I object to specifically is this paragraph three, as to inflection or tone of voice.)

(MR. KOVAC: It would have to be the clerk, and he could be instructed by the Court.)

(THE COURT: Mr. Durden, I'll ask you to read this report, and read it in a monotone.)

(MR. KOVAC: Without trying to imply any inference or change in your voice.)

2nd Phase: PSYCHIATRIC REPORT PUBLISHED —

(THE COURT: Without putting emphasis on any particu- 1377
lar part.)

MR. KOVAC: Your Honor, for the record, we would move the submission of this document as Defendant's Exhibit No. 1, and would further request that it be published to the jury.

THE COURT: It will be marked as Defendant's Exhibit No. 1.

MR. KOVAC: Your Honor, if it please the Court, at this time on behalf of the defendant we would request that Mr. Durden, Deputy Clerk, read to the jury the psychiatric evaluation report of Dr. George W. Barnard, which was prepared after an evaluation of the defendant, Mack Ruffin, on April 22, 1978, this report having previously been accepted into evidence by the Court as Defendant's Exhibit No. 1.

THE COURT: Proceed.

PSYCIATRIC REPORT READ BY CLERK AS FOLLOWS:

"This twenty-two year old black single male prisoner was seen in psychiatric evaluation at the Lake County jail by Drs. Barnard and Ferrerra on April 22, 1978. Psychiatric evaluation was requested by the Honorable John W. Booth, Circuit Judge of the Fifth Judicial Circuit in and for the Counties of Hernando and Sumter. Mr. Ruffin's defense attorney, William Stone, was present at the time of the evaluation.

Mr. Ruffin said he was arrested February 21, 1978,

and charged with two counts of first degree murder, one count of manslaughter, rape, kidnapping, robbery, attempted murder, shooting at a motor vehicle, and grand theft. 1378

He said he was accused of kidnapping, robbing, raping, and murdering Karol Hurst, a white female in her twenties in Sumter County, and murdering a white male whose name he did not know in Hernando County.

All the alleged crimes were said to have taken place on the date of his arrest, and he related the following story:

On the day of the alleged crimes he awoke at his home in Webster with his common-law wife, Carterie. That morning he stayed around home and watched television. At approximately nine o'clock that morning an acquaintance, Freddie Lee Hall, came by. At about one o'clock that afternoon the two men left Ruffin's house. Hall asked Ruffin if he wanted to pull a robbery, and at that time Hall had both the thirty-eight caliber and a thirty-two caliber pistol. Ruffin handed the gun back to Hall, telling him that he did not want to get involved.

Subsequently, as they sat in a parking lot, with Hall drinking brandy, Hall told Ruffin to follow him.

The two men walked up to a woman as she stood next to her car, and Hall told her to slide over. Hall drove the woman's car, and Ruffin drove his own car. Later the three of them were in the woman's car. Hall stopped the car and told the woman to take her clothes off, which she did. He had intercourse with her while Ruffin stood outside the car, and then Ruffin had intercourse with her. Later, outside the car, they talked, and Hall hit the woman on the back of the neck with his gun, and then shot her in the head.

The two men left and subsequently went to a store in order to rob it. Apparently the clerk became suspicious and called the police. The officer was in the process of shaking the two men down when Hall grabbed the officer and shot him.

The two men then left in the car and were later apprehended and placed under arrest. They have been in jail since the time of their arrest.

On the day of the alleged crimes Ruffin had no alcohol or drugs.

Previous Criminal Record: At age thirteen he was charged with snatching a pocketbook, and spent two days in jail. The charges were later dropped.

Past History: He was born in Center Hill, Florida,

September 24, 1955. His mother died when he was about two or three years of age, and his father died when Ruffin was about fourteen. His father was an alcoholic and accidentally burned himself to death. He is second in a sibling group of two. He was raised by Bertha McClain, a woman who had two children by Ruffin's father, as well as children of her own. He got along with her and never ran away from home.

He quit school in the ninth grade at age sixteen. There had been no grade failures. He skipped school a good bit of the time and was suspended once in the eighth grade. He was a slow learner and had special reading classes.

After quiting school he worked at several different types of field work, picking fruit, and as a service station attendant. The longest he held a job was six months. He was fired once.

He has never been married, but has lived with several different women, and has lived with his last common-law wife since June, 1977. He has two children, aged one and two, by two different women.

He was rejected in the military because he did not have sufficient education.

Medical History: He has had no operations. He

fell accidentally in 1968 and injured himself and was hospitalized for about three months. The type of injury he sustained was unknown to him. He denied any other serious injuries or illnesses. He has never been unconscious. He denied fits, seizures, or convulsions. He has had gonorrhea twice, and was treated on one occasion. He has had no serious medical illnesses. He denied any psychiatric treatment, either as an in-patient or as an out-patient. He has made no suicide attempts. Several times in the past when he was alone he has heard his name called when nobody was there. He denied any other perceptable maladies.

He began in the use of alcohol at age twenty-two. He has never been drunk, and considers himself a very light drinker. He has had no D.T.'s or shakes. He used 'pot' for the first time at age twenty-one, and denied the use of any other drugs.

Mental Status: The prisoner is a young man who appears his stated age. He is oriented to person, place and situation, and is partially oriented to time, in that he knows the day of the week, the month, and the year, but does not know the date. There is a mild deficit in both recent and remote memory. He is judged to be of dull, normal level of intelligence.

He can solve practical problems which are given him, 1382
but shows some degree of poor judgment and the lack
of concern for others in reaching two out of three
of the solutions. There is no indication of thought
disorder, and specifically no losing of associations,
or delusions. He can solve four out of five proverbs,
his effect is appropriate; and there is no sign of
undue anxiety or depression. He understands the
nature and quality of the charges against him, and
understands the roles of the different participants
in a trial.

Summary and Conclusions: The prisoner is a
twenty-two year old black single male, charged with
two counts of first degree murder, manslaughter, rape,
kidnapping, and robbery. From psychiatric examina-
tion, at this time there is no indication of psychosis.
It is my medical opinion that the prisoner is competent
and able to assist counsel in the preparation of his
defense, and it is my medical opinion that he was
legally sane at the time of the alleged crimes.

George W. Barnard, M.D."

MR. KOVAC: May it please the Court, the Defense rests.

THE COURT: You may proceed, Mr. Brown.

WHEREUPON, ARGUMENT TO JURY ON AGGRAVATING CIRCUM-
STANCES BY MR. BROWN:

2nd Phase: ARGUMENT BY STATE

MR. BROWN: Ladies and gentlemen, I think that Judge Booth explained to you from the very first day of this trial that in a first degree murder prosecution there were two phases, the first phase being the determination of the guilt or innocence of the defendant, and that phase is the one that you completed this morning. 1383

I think that Judge Booth explained in pretty good detail that the second phase was one where you listened to testimony and considered evidence, and determined whether there were aggravating circumstances or mitigating circumstances, and whether the aggravating circumstances, on a balance, outweighed the mitigating circumstances.

I believe that in just a few minutes, after I've spoken to you, and after Mr. Stone or Mr. Kovac has had a chance to speak to you, that Judge Booth will instruct you again, and I believe that he will instruct you at that time that you are to weigh all these factors and determine whether or not, on that balance, the aggravating circumstances in Karol Hurst's murder outweigh any possible mitigating circumstances.

I believe that he will instruct you further that if you find that those aggravating circumstances do outweigh the mitigating circumstances, that it is then your duty under the law, by majority vote, to advise this Court, or recommend, that it impose the death sentence.

I believe that each of you indicated when we were talking to you on vior dire before this trial started, that none of you had ever served on a first degree murder trial before as a juror. And I asked you at that time if you were willing to accept the responsibility of being on a jury dealing with a first degree murder. And ladies and gentlemen, this is the first time that I have had to stand before a jury dealing with a first degree murder, to ask it to return a death penalty. And it's not a responsibility which I take lightly. And it's not a burden which I do not feel.

But I do stand before you now, you, the jury, having convicted Mack Ruffin, Jr., of the premeditated murder of Karol Lea Hurst in Sumter County on February 21st, 1978. And I ask you to review the material before you, and I ask you to find that there are aggravating circumstances which exist in this murder which outweigh any possible mitigation, and which mandate that Mack Ruffin, Jr., receive that highest penalty provided by the laws of our State or our Nation. I ask you to advise this Court to impose that sentence of death.

I believe that Judge Booth will instruct you as to just what aggravating circumstances you can consider, and there are a list of eight aggravating circumstances. But I would ask you to pay attention only to three of those eight. And those three are:

That at the time of the crimes for wnich Mack Ruffin

is to be sentenced here, he had already been convicted of another captial offense. I would ask you to consider the testimony of Linda James, the deputy clerk who came up from Lake County, who testified that she was present as the presiding clerk in Lake County on the trial from May 22nd to June 1st, and that in that courtroom and in her presence, the jury returned a verdict against Mack Ruffin, Jr., of guilty of murder in the first degree, a capital offense. 138

There has also been introduced for your consideration, and you will be able to take back to the jury room with you, a copy of that judgment and sentence against Mack Ruffin, back on June 1st, of guilty of murder in the first degree.

Ladies and gentlemen, I believe that Judge Booth will instruct you that that is an aggravating circumstance, that Mack Ruffin has already been convicted of murder in the first degree in Lake County, and that you may consider that as aggravation, in the proper sense of the term here.

I believe that Mr. Stone on cross examination of Linda James asked what sentence did Mack Ruffin receive. I think that she testified that the Court in Lake County gave Mack Ruffin life imprisonment, and gave the co-defendant, Freddie Hall, the electric chair.

Well, ladies and gentlemen, it is your duty and your responsibility, in this case, to determine the appropriate sentence.

When Mack Ruffin was sentenced in Lake County, he had no prior convictions. As he stands before you now, he has been convicted of the highest crime against man or against the laws of the State of Florida, the premeditated murder of another human being. 1386

He went into Lake County without that conviction. He comes to you, for your consideration, stamped with that conviction for first degree murder. And now, this morning, you ladies and gentlemen have added a second conviction for first degree murder. And I ask you to consider that in determining what the appropriate penalty is for this murder, for the murder of Karol Hurst.

The second factor I would ask you to take into consideration, out of those eight, is whether or not the crime was committed while the defendant was engaged in committing kidnapping or robbery, and that if you find that the defendant killed Karol Lea Hurst during the course of a kidnapping or a robbery, that that is an aggravating circumstance for you to consider, which would justify the imposition of the death penalty.

And I believe that from Mack Ruffin's own statement, and from the other testimony, and from the psychiatric report which was read to you by the defendant's motion, that Mack Ruffin has told you he was a part of that kidnapping, and I believe that you must have found that he was, in returning

your verdict of guilty for the murder of Karol Hurst after she was kidnapped. 1387

And I believe that the testimony before you also is that she was robbed, she was robbed of her checkbook, of her wallet, of the one and only dollar bill that she had, which was stuck in her bankbook, and even of a check which she was forced to write out in twenty thousand dollars in trying to save her life. And I ask you to consider those factors, and to find that that is aggravation, in the death of Karol Lea Hurst.

The third factor which I would ask you to consider out of those eight circumstances, is whether or not this killing was heinous, atrocious, or cruel.

I believe that Judge Booth will instruct you as to just what heinous means; I think he will say it means extremely wicked or shockingly evil. I think he will also instruct you that atrocious means outrageously wicked or vile. I think he will tell you that cruel means designed to inflict a high degree of pain.

Now, I ask you to consider the testimony that was brought out for you as to the way that Karol Hurst died, the way her life was taken from her, by your verdict by Mack Ruffin, Jr., and see if it's not heinous, atrocious, and cruel.

I ask you to think of the testimony of Dr. Shutze, when he was talking of what Karol Hurst went through, in that

wooded area, away from friends, away from family, with no one 1388
but Mack Ruffin and Freddie Hall. With the pain that she went through with that wound to her breast. With the pain that she went through when Freddie Hall said, according to Mack Ruffin, "This is the way you break the neck," and chopped her on the back of the neck, with the pistol-whipping that Dr. Shutze testified to, seven or eight times, according to Mack Ruffin in his confession, that left those bruises. And then that she was slapped to the ground, and that a gun was placed to the back of her head, and in execution fashion, whether Mack Ruffin did it or whether he stood there while Freddie Hall did it, that trigger was pulled. And the bullet went smashing through Karol Hurst's brain.

I think Dr. Shutze testified that she died probably within thirty minutes, and that she probably didn't feel any pain. Well, after the rape, when Mack Ruffin said, "She didn't resist, no, man, she was just too, too scared." Now, after you think of the pain that Karol Hurst went through, when Mack Ruffin raped her, when she was seven months pregnant, and begging for the life of her unborn child, as well as for her own life, and think of the pain that she went through in that rape, the mental pain, and the anguish, even if she had been allowed to live, not to mention the physical pain, and think of the pain that she went through with the wound to her breast, the wounds to her back and to her neck, and ladies and gentle-

-men, I subm..t that there is proof beyond any doubt at all, 138
that the death inflicted on Karol Lea Hurst, in those woods, on the night of February 21st, was a cruell death, and a painful death.

And I believe that the testimony before you and the other evidence that you must consider in determining what sentence to impose, shows that it was heinous, it was wicked, it was vile.

The Judge will also list five other factors that you can consider as aggravating circumstances. And I'm not going to go through those five, because I really don't think they're necessary. I don't think that they're important, I don't think that they're needed.

I ask you to listen carefully to these three factors, and I ask you to remember all the testimony and everything you have heard as it relates to those three factors, those three aggravating circumstances.

Now, when I sit down, and this is the only chance I'll have to talk to you, Bill Stone or Mike Kovac will have a chance to talk to you, and they'll have a chance to say that there are mitigating factors, there are things, circumstances, which make this death not heinous or atrocious or cruel, which should justify, according to them, I believe they'll say that Mack Ruffin should get life imprisonment, for the brutal murder of Karol Hurst, just like he got life imprisonment for the

murder of that deputy in Hernando County, back in Lake County on June 1st. And the Judge will read you certain circumstances that can be considered as mitigating circumstances. And among those things he is going to read to you, that you may consider whether or not the defendant has a significant history of prior criminal activity. And I feel certain that Mr. Stone and Mr. Kovac will say to you, as Tom Mylander did from the stand, that on the check of Mack Ruffin's record, they found no prior adult convictions at the time he was arrested. And I think that Mr. Stone and Mr. Kovac will say, there was no significant prior history of criminal activity.

But I submit to you, ladies and gentlemen, that significant prior criminal history has two meanings, and one meaning for significant prior criminal history would be if Mack Ruffin had had a record of convictions that was a mile long, and maybe they would all be wreckless driving convictions, but there would be a hundred of them, and that would be a significant history of prior criminal activity.

But I submit that there is a second interpretation, and a valid interpretation, in this case, of significant prior criminal activity. And I submit that the nature, or degree of the offense that he has been convicted of before, is significant. And I believe that you could not find that there is no history of significant prior criminal activity, because his prior criminal activity before you now is a first degree murder

in Hernando County. And even if he only has one prior conviction of first degree murder, how much more significant criminal activity can there be, than that one conviction of premeditated murder? 1391

So when Mr. Stone and Mr. Kovac ask you to find that there was no significant history of prior criminal activity, I ask you to consider whether that can be believed, when that prior criminal activity is a first degree murder, and there can be nothing more significant than that.

I believe that Mr. Stone and Mr. Kovac will also cite you to a second factor that you can consider in mitigation, whether the defendant, at the time he killed Karol Hurst, was under the influence of extreme mental or emotional disturbance. And I ask you to consider the psychiatric report on the defendant, which Mr. Stone and Mr. Kovac have asked to be admitted into evidence. And I ask you specifically to look at it where it says that Mack Ruffin is competent, that he is sane, that he knows what he's doing, and that he was legally sane, with no psychosis, at the time he killed Karol Lea Hurst.

He knew what he was doing. And look also in the psychiatric report where it says that he was able to solve practical problems. Well, he solved a practical problem. The practical problem facing him on February 21st in that evening hour back in that wooded area, was how to avoid being caught and going to prison, for raping seven-months pregnant Karol

Hurst. And that was his practical problem. And just as the 1392
psychiatric report says, he solved that practical problem, he eliminated the witness, by killing her. He can solve practical problems.

And I believe that the psychiatric report also says that he has a lack of concern for others. Well, how much more lack of concern can there be for others than murdering a Hernando County deputy, and killing in cold blood Karol Lea Hurst, after pistol-whipping her and raping her.

I ask you to consider that in reading the psychiatric report that the defendant has introduced into evidence.

The psychiatric report also says, and I believe that Mr. Stone or Mr. Kovac will talk to you about his what the Doctors call, dull, normal intelligence.

I submit to you, ladies and gentlemen, that anyone of normal intelligence, and without mental disease, who was legally sane, who commits a brutal and viscious killing, as Mack Ruffin did, whether that intelligence is high normal, or normal, or low normal, is of no significance. And it's certainly not a mitigating factor.

I believe that they will also tell you that Mack Ruffin is only twenty-two years of age. I think that testimony is already before you from the psychiatric report. And I believe that Judge Booth will tell you that one of the circumstances that you may consider as a mitigating circumstance, is

the age of Mack Ruffin. And he is twenty-two years of age. 1393
And that is young.

And Karol Hurst, was twenty-one years of age. And that's young. And the unborn child that Karol Hurst was carrying at the time she was murdered by Mack Ruffin, was also young.

And ladies and gentlemen, can Karol Hurst's murder, at twenty-one years of age, be less severe than the death penalty to Mack Ruffin at twenty-two years of age, when he snuffed out her life in the fashion that he did?

I submit that whether he's twenty-two years of age, whether he's an adult at eighteen years of age and one day, that for the brutal execution murder and rape of Karol Hurst, that he must receive that final and highest penalty that the State of Florida, the People of the State of Florida, can impose.

And I submit to you, ladies and gentlemen, as much as it breaks my heart to ask it, I ask you, please, to consider these circumstances. And I beg of you to return a verdict, not a verdict, ... I ask you, to return to this courtroom, and to tell Mack Ruffin, and the rest of this world, that for what he did to Karol Lea Hurst, that he must die. And I ask you to return ..... I ask you to return an advisory sentence of death by electrocution.

(EMOTIONAL SILENCE.)

WHEREUPON, ARGUMENT TO JURY ON MITIGATING CIRCUM-

2nd Phase: ARGUMENT BY DEFENSE

-STANCES BY MR. STONE:

1394

MR. STONE: Your Honor, may it please the Court, ladies and gentlemen, as previously indicated by Mr. Brown, he will not have another opportunity to address you, nor will I. At this point we both make our final address to you prior to you making your recommendation of sentence to the Court.

I think that you probably all recognize, and I feel that the Judge will ultimately instruct you, that your determination as regards the sentence, is not, and it's not meant to be, merely a mathematical exercise, where you adjourn to your jury room back here, and count up the number of aggravating circumstances, and then count up the number of mitigating circumstances, and draw a line and say, we have so many mitigating and we have so many aggravating, and make your determination based on the mathematical results of your addition process.

Rather, the function of this proceeding, and your participation in this proceeding, is to bear the burden and the responsibility of addressing yourselves to the circumstances, the overall circumstances involved in this particular situation, and to make a reasonable judgment based upon those circumstances, and arrive at a result based upon the totality of the circumstances.

As previously indicated by Mr. Brown, the Judge will, when I am concluded here, make instructions to you, and during

those instructions he will instruct you as to the aggravating circumstances that you may properly consider, as well as mitigating circumstances that should be considered, before you evaluate and determine your recommendation of sentence in this particular matter. 1395

As previously indicated by Mr. Brown, the Court will instruct you that the mitigating circumstances will include the determination that the defendant has no significant prior criminal record. I think that's been determined. Prior to February 21st, 1978, this man had no significant criminal record. He was twenty-two years old and he had no significant criminal record. The only criminal record that he has at this time, the conviction that was introduced by the State of Florida, was for an offense that likewise occurred on the 21st of February, 1978, and occurred subsequent to the instant offense for which he is on trial for here. At the time that this particular matter came about, he had no prior criminal record of any convictions. As indicated in the psychiatric report, he had a prior juvenile record of purse snatching, but for which the charges were ultimately dropped, when he was thirteen or fourteen years old. I would submit to you that that is a significant consideration.

This man is not .... he's not coming before you for your determination of recommendation to the Court as a repeat offender, a chronic criminal, someone who has run rampant through

society for a number of years and either hasn't been caught or has been caught and given a slap on the hand, or something of that nature. He did manage to get twenty-two years old without having any significant criminal record. And he didn't have a significant criminal record until the 21st day of February, 1978. 1396

I think the Court will also instruct you, as has been indicated by Mr. Brown, that you may properly consider as a mitigating circumstance the age of the defendant. In this regard, as indicated by Mr. Brown, the defendant is twenty-two years old. But I think more importantly, you should consider his age in relationship to his co-defendant,, who, according to Officer Mylander, was approximately thirty or in his early thirties. And obviously, by his mere age, he would have some influence over this man over here. A little more worldly, a little more experience, a little more familiar with exactly what was going on on that afternoon and evening of February 21st, 1978, than someone who had no criminal record and was some nine, ten, or eleven years younger than he was.

I think the Court will also instruct you to the effect that you may consider as a mitigating circumstance as to whether the defendant was an accomplice in the offense which is being considered, and in this regard, whether the offense was committed by another person, and that the defendant's participation in the commission of that offense was relatively minor.

Now, you have made your determination of his guilt in 139
this regard. But I think from a recollection of the evidence introduced by the State as regards this particular offense, it is uncontroverted that the co-defendant, Hall, was the man that actually committed the offense. This man was there, and you've made your determination that he participated in that offense, but his participation was significantly minor as compared with that of Hall. Hall was the man that did the shooting, Hall is the man that did the slapping, Hall is the man that did the chopping.

You're here to consider the death penalty as regards the death of Karol Lea Hurst. This man did not actually pull the trigger that killed Karol Lea Hurst. That particular act was committed by his co-defendant, thirty-one year old, muscular, taller, larger, considerably more muscular than this man, Freddie Lee Hall.

I think that the Court will also instruct you that you may properly consider as a mitigating circumstance, whether the defendant was under the substantial domination of another person. And I submit to you, as I have alluded to earlier, that is definitely not without the realm of possibility. You've got a man that's nine, ten, eleven years older, somewhere in that area, older than this man over here; he's bigger, he's more muscular, and he has previously been convicted of one of the offenses with which this man is charged now because of his

association with this other man. 1398

You have here a man who is twenty-two years old. He has been described, as indicated by Mr. Brown, and as indicated in the psychiatric report, as being a of low or dull average intelligence. He has poor judgment. He was sixteen years old when he quit school, dropped out in the ninth grade; he obviously had failed several grades prior to dropping out of school.

He lacks education, he's had no meaningful vocational training. He was raised in a home by someone he's not related to; his mother died when he was two years old, his father died when he was fourteen, burned himself to death because he was a chronic alcoholic, he burned his house down. He was raised in a home where he had no significant parental control, or guidance, no particular concern, and complete lack of any kind of normal home life.

I recognize that the social concepts that we are totally inundated with day in and day out, they probably are overdone, but considering the totality of the circumstances, the relative relationship between Freddie Lee Hall and Mack Ruffin, and in making your determination as to the domination of this man by Hall, these factors are considerable, and they are significant, and they should be considered. They are all set forth in the psychiatric report.

As regards the overall circumstances of the offense itself, I think we should also consider, reconsider, the ini-

-tiator of all of the action in this particular incident. 1399
Hall is the one that took the car, the girl's car. Hall is the one that forced himself into the car at gunpoint. Hall is the one that had the gun. Hall is the one that slapped the girl down, Hall is the one that beat the girl in the back of her neck and the head with the pistol. Hall is the one that shot the girl after forcing her to have sex with him at gunpoint. And Hall is the one that while he was chopping the girl in the back of the neck with the pistol, was yelling, "This is the way you break someone's neck," or something to that effect.

Hall is the one that, when this man tried to convince him that they ought to just tie her up and go, "Let's get out of here, let's go," started waving his gun around and hollering, "I'm not going back," something to that effect, "I've been there before and I'm not going back," and started his irrational, demented raving out there in the middle of the woods.

He said he wasn't going back: exactly where do you think he meant? Going back to prison for another offense just like he had committed before when he was sent up there.

Again, you have made your determination as far as this man's participation in that actual offense, but rather than being the initiator of the action, or sitting there and encouraging the action. On several instances the man testified in his statement, which was introduced into evidence during the

State's case in chief, when the girl suggested that she could 140
give them ransom, twenty thousand dollars, just let her go,
this man over here stated in his statement that he suggested
to Freddie that they take that, "Go ahead and try that, let's
do that," rather than kill her and all this other stuff. And
subsequently, after the incident there in the car, he testi-
fied in his statement, that was introduced into evidence by the
State, that he really wanted to let her go, "That's what I
wanted to do, but Freddie Lee went to hollering and waving his
gun, saying he had done been up one time and he wasn't going
back for nobody." "You know, there just wasn't too much I
could say, when he got the gun, he ain't give me none until we
got over here. There wasn't too much I could say." There was
that ranting, raving, muscle-bound, deranged, maniac out there
with a pistol, he's unarmed, he's already forced himse'f on the
girl, and he starts ranting and raving and hollering about how
he's not going back up there again. This man is unarmed, what
can he do?

Again, after Hall got her out of the car, walked her
down there, and by this weeded path that the State has de-
scribed to you, he gets her down there and then they start
this conversation about the check, and then he wants Ruffin,
here, to hit her. And he wouldn't do it. Ruffin said, "I
told him, just tie her up, tie her up, just let's go; by tying
her up, when she gets loose, we been done did what we were

going to do and gone. Man, don't kill her, just tie her up and let's get out of here. By the time she gets loose, we'll be gone." 1407

I think it should also be recalled, as stated before, it's obvious from the situation of him even being there, that he's not a perfect attender at Sunday school, he's not the ideal Boy Scout, and he's not the paragon of virtue that I mentioned to you yesterday, but he didn't set out to murder anybody. They set out going to pull a job, which the State has described to you as being a robbery. But when he set out, he didn't anticipate or intend to kill anybody. There was no way he could, they were going out to pull a job at a convenient store, where they ultimately ended up. But he didn't set out with the intention or anticipation of helping Hall kill somebody, and it's obvious from his statement that he attempted to dissuade the man from doing exactly that.

I think you can also properly consider, from the statement that was introduced by the State, that he did not actually commit the offense himself. Hall is the one that pulled the trigger.

When you get right down to it, there is every reason to conclude from the evidence that has been presented, that there is a distinct likelihood that this man wouldn't even be here today if he hadn't exercised his poor judgment and associated with this idiot Hall, and decided that that would be

his friend and companion that he would play cards with and go drive to Leesburg with. There is nothing from anything that has been introduced during the State's case in chief, or that you have heard this afternoon, that indicates that this man had the capacity, or the intuition, or the inclination, to initiate an offense of this nature. There is every indication that Hall did, and that Hall got him into it. 140

Truly, we all recognize the burden that has been placed on you. Something of this nature is obviously serious. All murders, all homicides, are offensive. They are especially offensive to normal people such as yourselves, who have any type of normal sensitivity, or people who rationally relate to other people and to society in general. But in making your conclusion and your recommendation to the Court, you've got to consider this case with an understanding and appreciation of the totality of the circumstances involved in this thing. You've got to try and make a recommendation as to an appropriate punishment, with two alternatives in mind, after taking into consideration all the circumstances, and recognizing the degree of punishment that would be appropriate for this man for the offense that you have convicted him of, after his relationship with Hall.

As has been indicated by at least two people that have testified during this stage of the proceedings, the only jury that has observed these two individuals together and made

any determination as to their guilt or innocence together, made that determination and found both of them guilty, but they made a recommedation of death for Hall and life for this man right over here. As has previously been indicated to you, the only other jury that has considered this particular offense and made a determination and a recommendation, made the determination that Hall was guilty of this offense, and they also made the recommendation that he should get death for that offense. 1403

But I submit to you that it would be appropriate, it is appropriate in this offense, even with the nature of the offense itself, to make a distinction between the two co-defendants.

There should be some distinction made in the degree of punishment. They've both been found guilty of first degree murder. But their participation in that act, their overall involvement in that act, their inclination as indicated by the evidence, does not mandate or require the same punishment. There should be some distinction as regards the punishment itself.

If you feel from the evidence that he's guilty, he's guilty. But that still doesn't necessarily mandate that he likewise should die for his involvement in this particular offense. Hall is the initiator, Hall is the active participant. This man was there, his participation in the sexual aspect of

it is obvious, but it is not as obvious that he had an active, initiating, active part, participating in the actual homicide itself. With his age, his background, his intelligence level, his prior criminal record, and his involvement as indicated by the circumstances in this offense, I think it's more than appropriate that you definitely consider a distinction in the punishment.

This man, I implore you to seriously consider, even with regard to the offense itself, a recommendation of life. To recommend death, death is not going to correct the wrong that has been done. That's obvious, all of us recognize that. There are people that none of us will see again as a result of what happened on that day. But there is definitely an appropriate distinction that should be made with regard to the punishment of the individuals who you deem responsible for those actions that occurred on that day.

I submit to you that that is one of the more appropriate aspects of our criminal justice system, it's the ability to take into consideration the totality of the circumstances in any given offense and punish accordingly.

You are placed in the position of being able to have the responsibility and input into making that distinction. And this, I submit to you, is a very appropriate case for your consideration in making that distinction.

The case itself, and the totality of the circumstances,

do not mandate a death penalty for this man. 1403

Thank you.

THE COURT: Take the jury out, please.

JURY EXCUSED FROM OPEN COURT.

THE COURT: Take the defendant out.

DEFENDANT ESCORTED FROM COURTROOM.

THE COURT: Court will be in recess for ten minutes.

BRIEF RECESS.

WHEREUPON, COURT RECONVENED, THE DEFENDANT IS PRESENT, THE JURY RETURNED TO OPEN COURT, AND THE FOLLOWING PROCEEDINGS WERE HAD:

WHEREUPON, COURT'S CHARGE TO JURY ON ADVISORY SENTENCE.

SEE VOLUME VIII
FOR COURT'S CHARGE ON ADVISORY SENTENCE

2nd Phase: COURT'S CHARGE

THE COURT: Ladies and gentlemen of the jury, it is 1407
now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of first degree murder. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge. However, it is your duty to follow the law which will now be given you by the Court, and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Your verdict should be based upon the evidence which has been presented to you during these proceedings.

The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence:

(a) That the crime for which the defendant is to be sentenced was committed while the defendant was under sentence of imprisonment;

(b) That at the time of the crime for which he is to be sentenced, the defendant had been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person;

(c) That the defendant, in committing the crime for which

he is to be sentenced, knowingly created a great risk of death 140
to many persons;

(d) That the crime for which the defendant is to be sentenced was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb;

(e) That the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(f) That the crime for which the defendant is to be sentenced was committed for pecuniary gain;

(g) That the crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

(h) That the crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel.

"Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others; pitiless.

If you do not find that there existed sufficient of the aggravating circumstances which have been described to you, it will be your duty to recommend a sentence to life imprison-

-ment.

Should you find sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist. The mitigating circumstances which you may consider, if established by the evidence, are these:

(a) That the defendant has no significant history of prior criminal activity;

(b) That the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(c) That the victim was a participant in the defendant's conduct or consented to the act;

(d) That the defendant was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another person, and the defendant's participation was relatively minor;

(e) That the defendant acted under extreme duress or under the substantial domination of another person;

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, was substantially impaired;

(g) The age of the defendant at the time of the crime.

Aggravating circumstances must be established beyond

a reasonable doubt before they may be considered by you in arriving at your decision. Proof of an aggravating circumstance beyond a reasonable doubt is evidence by which the understanding, judgment and reason of the jury are well satisfied and convinced to the extent of having a full, firm and abiding conviction that the circumstance has been proved to the exclusion of and beyond a reasonable doubt. 1410

Evidence tending to establish an aggravating circumstance which does not convince you beyond a reasonable doubt of the existence of such circumstance at the time of the offense, should be wholly disregarded.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances, and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed.

The sentence which you recommend to the Court must be based upon the facts as you find them from the evidence and the law as given you by the Court. Your verdict must be based upon your finding of whether sufficient aggravating circumstances exist and whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances found to exist. Based on these considerations, you should advise the Court whether the defendant should be sentenced to life imprisonment or to death.

In these proceedings it is not necessary that the 141
verdict of the jury be unanimous, but a verdict may be rendered upon the finding of a majority of the jury.

The fact that the determination of whether or not a majority of you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot, should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that a human life is at stake, and bring to bear your best judgment upon the sole issue which is submitted to you at this time: Whether a majority of your number recommend that the defendant be sentenced to death or to life imprisonment.

Should a majority of the jury determine that the defendant should be sentenced to death, you should recommend an advisory sentence as follows:

A majority of the jury advise and recommend
to the Court that it impose the death penalty
upon the defendant, C. Mack Ruffin, Jr.

On the other hand, if, after considering all the law and the evidence touching upon the issue of punishment, a majority of the jury determine that the defendant should not be sentenced to death, then you should render an advisory sentence as follows:

A majority of the jury advise and recommend to the Court that it impose a sentence of life imprisonment upon the defendant, C. Mack Ruffin, Jr.

The law requires that seven or more members of the jury agree upon any recommendation advising either the death penalty or life imprisonment. You will now retire to consider your recommendation, and when seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned into court.

I am going to give these instructions to the bailiff to hand to the foreman, and I am also going to give the bailiff the two advisory sentences, which I will read to you at this time:

A majority of the jury advise and recommend to the Court that it impose a sentence of life imprisonment upon the defendant, C. Mack Ruffin, Jr. Dated this blank day of blank, 1978. With a place for your foreman to sign.

The other form of advisory sentence is as follows: A majority of the jury advise and recommend to the Court that it impose the death penalty upon the defendant, C. Mack Ruffin, Jr. Dated this blank day of blank, 1978. With a place for your

foreman to sign.

Does the State or the defendant have any objections to these instructions as given?

MR. BROWN: The State does not, Your Honor.

MR. KOVAC: The Defense does not, Your Honor.

THE COURT: Take the jury out.

WHEREUPON, JURY RETIRED TO CONSIDER ITS ADVISORY SENTENCE, COURT STANDING BY.

(THERE BEING NO OBJECTION BY ANY COUNSEL TO THE EXHIBITS UPON THEIR INSPECTION, EXHIBITS DELIVERED TO JURY.)

WHEREUPON, COURT RECONVENED, THE DEFENDANT IS PRESENT, THE JURY RETURNED TO OPEN COURT WITH ITS ADVISORY SENTENCE RECOMMENDATION, AND THE FOLLOWING PROCEEDINGS WERE HAD:

THE COURT: Mr. Ford, has the jury arrived at an advisory sentence?

JURY FOREMAN: Yes, we have, Your Honor.

THE COURT: Hand it to the bailiff.

ADVISORY SENTENCED HANDED TO BAILIFF, INSPECTED BY THE COURT, PASSED TO THE CLERK FOR PUBLISHING AS FOLLOWS:

In the Circuit Court of the Seventh Judicial Circuit of the State of Florida, In and For Putnam County. Criminal Case Number 78-433-CF. State of Florida versus C. Mack Ruffin, Jr., Defendant.

Advisory Sentence:

A majority of the jury advise and recommend to the Court that it impose the death penalty upon the defendant, C. Mack Ruffin, Jr. Dated this 20th day of July, 1978. James D. Ford, foreman. 141

THE COURT: Poll the jury.

CLERK: Ladies and gentlemen of the jury, it is necessary that we poll you to make absolutely sure that the advisory sentence which you have just returned is that upon which a majority of you agree. We are going to ask each of you individually concerning this, but you are instructed that it is not necessary that you state how you personally voted, or how any other person voted, but only if the advisory sentence, as read, was correctly stated.

Do you, Mr. Ford, agree and confirm that a majority of the jurors joins in the advisory sentence which you have just heard read by me?

JUROR #1: Yes.

CLERK: Do you, Mr. Phillips, agree and confirm that a majority of the jurors joins in the advisory sentence which you have just heard read by me?

JUROR #2: Yes.

CLERK: Do you, Mr. May, agree and confirm that a majority of the jurors joins in the advisory sentence which you have just heard read by me?

2nd Phase: JURY POLLED

JUROR #3: Yes.

CLERK: Do you, Mr. McLeod, agree and confirm that a majority of the jurors joins in the advisory sentence which you have just heard read by me?

JUROR #4: Yes.

CLERK: Do you, Mr. Sharp, agree and confirm that a majority of the jurors joins in the advisory sentence which you have just heard read by me?

JUROR #5: Yes.

CLERK: Do you, Mrs. Delaney, agree and confirm that a majority of the jurors joins in the advisory sentence which you have just heard read by me?

JUROR #6: Yes.

CLERK: Do you, Mr. Wilson, agree and confirm that a majority of the jurors joins in the advisory sentence which you have just heard read by me?

JUROR #7: Yes.

CLERK: Do you, Mrs. Tomlinson, agree and confirm that a majority of the jurors joins in the advisory sentence which you have just heard read by me?

JUROR #8: Yes.

CLERK: Do you, Mrs. McTurk, agree and confirm that a majority of the jurors joins in the advisory sentence which you have just heard read by me?

JUROR #9: Yes.

CLERK: Do you, Mr. Nicholson, agree and confirm that 1410
a majority of the jurors joins in the advisory sentence which you have just heard read by me?

JUROR #10: Yes.

CLERK: Do you, Mrs. Eubanks, agree and confirm that a majority of the jurors joins in the advisory sentence which you have just heard read by me?

JUROR #11: Yes.

CLERK: Do you, Mrs. Mew, agree and confirm that a majority of the jurors joins in the advisory sentence which you have just heard read by me?

JUROR #12: Yes.

THE COURT: All right, ladies and gentlemen, I want to take this opportunity to thank each of you individually for having come here and agreed to serve on this case. It has been a long case, a technical case, one interrupted by many sessions where you were asked to leave the courtroom. And we especially appreciate it, since this was a case that was, of course, moved from a county not even in your circuit, but we do thank you.

I'm going to ask that you go back into your jury room for dismissal.

WHEREUPON, JURY DISMISSED FROM FURTHER SERVICE.

THE COURT: The Court will further review the evidence that has been admitted in this case, and make a determination this evening. Sentencing is set for nine o'clock

IN THE CIRCUIT COURT
LAKE COUNTY, FLORIDA

Spring TERM 19 78

STATE OF FLORIDA

VS

CASE NUMBER 78-248 CF B

W. C. "Mack" Ruffin, Jr.
DEFENDANT

JUDGMENT AND SENTENCE

The Defendant M. C. "MACK" RUFFIN, JR. being personally before this Court, represented by J. Ray Shaw and Michael T. Kovach Assistant Public Defenders, his attorney of record,

having been tried and found guilty of the crime of
~~entered a plea of guilty to the crime of~~
~~entered a plea of nolo contendere to the crime of~~

MURDER IN THE FIRST DEGREE 782.04

and the Court having inquired and given the Defendant an opportunity to be heard and show cause why he should not be adjudged guilty and sentenced as provided by law, including an opportunity to offer matters in mitigation of sentence, and no cause being shown, it is thereupon:

Ordered that the Defendant M. C. "MACK" RUFFIN, JR. is hereby adjudicated guilty of the crime of MURDER IN THE FIRST DEGREE 782.04

It is the sentence of the law that said Defendant be committed to the custody of the DEPARTMENT OF OFFENDER REHABILITATION to be imprisoned for the term of LIFE

in the institution in the State Correctional System to which said Department shall cause you to be confined. (The Court recommends that you be confined at _____ type institution.)

It is further ordered that you shall be allowed _____ credit for such time as you have been incarcerated prior to the imposition of this sentence for this offense. (No credit should be allowed if the Defendant is already under sentence or if credit has been previously given for another offense. Strike if not applicable.)

It is further ordered that this sentence is (concurrent) (consecutive) with the sentence imposed for the crime of _____ in Case Number _____, _____ County. (Strike if not applicable.)

It is further ordered that the Sheriff of Lake County, Florida, is hereby ordered and directed to deliver said Defendant to the DEPARTMENT OF OFFENDER REHABILITATION together with a copy of this Judgment and Sentence.

It is further ordered and adjudged that said defendant shall pay the sum of One Dollar ($1.00) pursuant to Section 943.25, Florida Statutes.

☒ The Defendant in Open Court was advised of his right to appeal from this Judgment and Sentence within thirty days from this date, and the Defendant's entitlement to the assistance of counsel in taking said appeal upon a showing that said Defendant was entitled to an attorney at the expense of the State.)

☐ (The Defendant in open Court was advised that without expressly reserving his right to appeal he gave up his right to appeal any and all matters relating to the judgment, including the issue of guilt or innocence, but that his plea did not impair his right to review by appropriate collateral attack.)

FILED IN OPEN COURT
JAMES C. WATKINS
CLERK CIRCUIT COURT
LAKE COUNTY, FLORIDA
By: James C. Watkins
Deputy Clerk

418

Best Copy Available

The following are the fingerprints of the above-named Defendant.

H. C. "HACK" RUFFIN, JR.

1. Right Thumb	2. Right Index	3. Right Middle	4. Right Ring	5. Right Litt
6. Left Thumb	7. Left Index	8. Left Middle	9. Left Ring	10. Left Litt

DONE AND ORDERED in Open Court at Tavares, Lake County, Florida, this 1st day of JUNE, A.D. 1978.

I HEREBY CERTIFY that the above and foregoing fingerprints on this Judgment and Sentence are the fingerprints of the Defendant H. C. "HACK" RUFFIN, JR. and that they were placed thereon by said Defendant in my presence in Open Court this date.

W. Booth

CIRCUIT JUDGE

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.--

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s.775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy of the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

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Case No. 81-5046

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

MACK C. RUFFIN, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL
STATE OF FLORIDA

CHARLES CORCES, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Respondent

QUESTIONS PRESENTED

I.

WHETHER A DEATH SENTENCE, WHICH IS BASED IN PART UPON THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL CRIME OCCURRED WHILE THE DEFENDANT WAS ENGAGED IN A KIDNAPPING AND ROBBERY, CAN PASS DUE PROCESS AND CRUEL AND UNUSUAL PUNISHMENT PROHIBITION STANDARDS, WHEN THE KIDNAPPING AND ROBBERY OFFENSES WERE NOT CHARGED AND THE JURY WHICH CONSIDERED THE AGGRAVATING CIRCUMSTANCES AND RECOMMENDED THE DEATH SENTENCE RECEIVED NO INSTRUCTIONS ON THE ELEMENTS OF ROBBERY AND KIDNAPPING?

II.

WHETHER A CRIME OCCURRING DURING THE SAME CRIMINAL EPISODE AS A CAPITAL CRIME, AND ONLY A FEW HOURS AFTER THAT CAPITAL OFFENSE, CAN NEGATE THE MITIGATING CIRCUMSTANCE OF NO PRIOR HISTORY OF CRIMINAL ACTIVITY PROVIDED FOR BY FLORIDA'S DEATH PENALTY STATUTE WITHOUT OFFENDING THE PRINCIPLES OF DUE PROCESS AND SUBJECTING THE CAPITAL DEFENDANT TO CRUEL AND UNUSUAL PUNISHMENT?

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OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 397 So.2d 277 and correctly appears in Appendix A of the Petition for Writ of Certiorari.

JURISDICTIONAL STATEMENT

Respondent does not question the jurisdictional statement as stated in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case.

REASONS FOR DENYING WRIT

As to Issue I

ISSUE I.

WHETHER A DEATH SENTENCE, WHICH IS BASED IN PART UPON THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL CRIME OCCURRED WHILE THE DEFENDANT WAS ENGAGED IN A KIDNAPPING AND ROBBERY, CAN PASS DUE PROCESS AND CRUEL AND UNUSUAL PUNISHMENT PROHIBITION STANDARDS, WHEN THE KIDNAPPING AND ROBBERY OFFENSES WERE NOT CHARGED AND THE JURY WHICH CONSIDERED THE AGGRAVATING CIRCUMSTANCES AND RECOMMENDED THE DEATH SENTENCE RECEIVED NO INSTRUCTIONS ON THE ELEMENTS OF ROBBERY AND KIDNAPPING?

In Florida, one of the aggravating circumstances that may be considered by the sentencer is whether

> "The capital felony was committed while the defendant was engaged or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb." Fla.Stat. 921.141(5)(d) (1977)

Essentially, petitioner argues that the sentencing authority may not find this aggravating circumstance to exist unless the defendant is formally charged and convicted of the underlying felony. The Florida Supreme Court held in petitioner's case otherwise. It said:

> "It is not necessary that Ruffin be charged and convicted of the robbery and the kidnapping that led to the murder of Mrs. Hurst. The State proved beyond a reasonable doubt that concomitant with the murder Ruffin also committed the robbery and the kidnapping."
>
> (Petitioner's A1 p.8)

Relying on Presnell v. Georgia, 439 U.S. 14 (1978), Petitioner contends that he was denied due process of law and is being subjected to cruel and unusual punishment because he was not formally charged and convicted of the underlying felony constituting the aggravating circumstances found in Florida Statutes 921.141(5)(d).

His reliance on Presnell is misplaced. In Presnell the Court held that due process did not allow an appellate court to sustain a sentence of death based on an aggravating circumstance which was neither considered nor found to have existed by the sentencing authority.

In Presnell, Presnell had been found guilty of murder and the jury, in its determination of whether to impose the sentence of death, was instructed that one of the aggravating circumstances they could consider was whether the murder had been committed while Presnell was engaged in the commission of kidnapping with bodily harm; aggravated sodomy. The jury found this aggravating

circumstance to exist (which apparently was the only one under the murder charge). However, the Georgia Supreme Court held that the state could not rely upon sodomy as constituting the bodily injury associated with the kidnapping. Nonetheless, it held that there was sufficient evidence of forcible rape and this sufficed to constitute the bodily injury associated with the kidnapping. The problem was that the jury was never asked to consider, nor did it find forcible rape as the underlying felony associated with the kidnapping. Consequently, the Georgia Supreme Court made a finding not made by the sentencing authority, i.e., the jury.

That was not the situation in the instant case. Unlike in Georgia, the judge is the sentencing authority under Florida's death penalty statute. Lamadline v. State, 303 So.2d 17 (Fla.1974). The judge, as the sentencer in the instant case, was the one that made the finding that the murder was committed during the perpetration of a robbery and kidnapping - and he did so based on evidence establishing this beyond a reasonable doubt.

As to Issue II

ISSUE II.

WHETHER A CRIME OCCURRING DURING THE SAME CRIMINAL EPISODE AS A CAPITAL CRIME, AND ONLY A FEW HOURS AFTER THAT CAPITAL OFFENSE, CAN NEGATE THE MITIGATING CIRCUMSTANCE OF NO PRIOR HISTORY OF CRIMINAL ACTIVITY PROVIDED FOR BY FLORIDA'S DEATH PENALTY STATUTE WITHOUT OFFENDING THE PRINCIPLES OF DUE PROCESS AND SUBJECTING THE CAPITAL DEFENDANT TO CRUEL AND UNUSUAL PUNISHMENT?

As a mitigating circumstance under Florida Statutes 921.141(6)(a) the sentencing authority may consider whether:

(a) The defendant has no significant history of a prior criminal activity.

The sentencing authority in the instant case did not find that mitigating circumstance to exist. Petitioner argued below as he does here that it was improper for the sentencing authority to consider the murder of Deputy Coburn as negating the absence of significant prior criminal history. The Supreme Court of Florida held that prior means prior to sentencing. Consequently, even though the deputy's murder occurred in point of time after the murder of Mrs. Hurst, it could be considered by the sentencing authority in its determination as to whether at the time of sentencing petitioner had any significant prior history of criminal activity.

Petitioner is asking the Court to grant certiorari and hold that this is constitutionally unfair. He wants this Court to say that it matters not how many other murders he may have committed the same day, the sentencing authority cannot take those murders into consideration in making its determination as to whether or not petitioner had a significant history of prior criminal activity. Given the fact that Florida law is for Florida to interpret, Gardner v. Louisiana, 368 U.S. 157 (1961), he fails to explain how that interpretation denies him due process or subjects him to cruel and unusual punishment, except to make a specious comparison with Godfrey v. Georgia, 446 U.S.420 (1980).

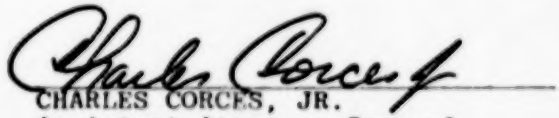
In Godfrey, the Court simply held that where the sole aggravating circumstance involves the quality or character of the homicide, the definition of the elements of that aggravating factor must set it apart from the norm or usual murder case; otherwise it violates the Eighth Amendment because, if not, any homicide would automatically qualify as a death case. There is no conflict between Godfrey and the holding of the Supreme Court of Florida in the instant case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, CHARLES CORCES, JR., a member of the Bar of the Supreme Court of the United States and counsel of record for the State of Florida, Respondent herein, hereby certify that on July 22 , 1981, pursuant to Rule 33, Rules of the Supreme Court of the United State, I served three copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari on Jerry Hill, Public Defender, counsel for petitioner herein, by depositing such copies in the United States Post Office, Tampa, Florida, with first class postage prepaid, properly addressed to 495 N. Carpenter Street, Hall of Justice Annex, Bartow, Florida 33830.

All parties required to be served have been served.

Of Counsel for Respondent